

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 09-50026

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In the Matter of:

MOTORS LIQUIDATION COMPANY, et al.

f/k/a General Motors Corporation, et al.,

Debtors.

- - - - -x

United States Bankruptcy Court

One Bowling Green

New York, New York

August 3, 2009

9:05 AM

B E F O R E:

HON. ROBERT E. GERBER

U.S. BANKRUPTCY JUDGE

VERITEXT REPORTING COMPANY

212-267-6868

516-608-2400

1
2 HEARING re Hearing to Consider Limited Contract Objections
3 Relating to Debtors' Motion Pursuant to 11 U.S.C. §§ 105,
4 363(b), (f), (k), and (m), and 365 and Fed. R. Bankr. P. 2002,
5 6004, and 6006, to (I) Approve (A) the Sale Pursuant to the
6 Master Sale and Purchase Agreement with Vehicle Acquisitions
7 Holdings LLC (n/k/a NGMCO, Inc.), a U.S. Treasury-Sponsored
8 Purchaser, Free and Clear Of Liens, Claims, Encumbrances, and
9 Other Interests; (B) the Assumption and Assignment of Certain
10 Executory Contracts and Unexpired Leases; and (C) Other Relief;
11 and (II) Schedule Sale Approval Hearing

12
13 HEARING re Debtors' Fourth Omnibus Motion Pursuant to 11 U.S.C
14 § 365 to Reject Certain Executory Contracts

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16 HEARING re Motion by Debtors for Entry of Order Authorizing
17 Rejection of Certain Personal Property Agreements and/or
18 Abandonment of Collateral to Secured Creditors

19
20 HEARING re Omnibus Motion of Debtors for Entry of Order
21 Pursuant to 11 U.S.C. Sections 105 and 365 Authorizing (A) the
22 Rejection of Executory Contracts and Unexpired Leases with
23 Certain Domestic Dealers and (B) Granting Certain Related
24 Relief

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HEARING re Motion of Debtors for Entry of Order Pursuant to 11
U.S.C. §§ 105(a) and 331 Establishing Procedures for Interim
Compensation and Reimbursement of Expenses of Professionals

HEARING re Application of the Official Committee of Unsecured
Creditors of Motors Liquidation Company for Entry of an Order
Authorizing the Employment and Retention of Epiq Bankruptcy
Solutions, LLC as the Committee's Information Agent Nunc Pro
Tunc to June 3, 2009

HEARING re Motion of Debtors for Entry of Order Pursuant to 11
U.S.C. § 105(a) and Fed. R. Bankr. P. 1015(c) and 9007
Establishing Notice and Case Management Procedures

HEARING re Motion of the Official Committee of Unsecured
Creditors for an Order Establishing Procedures for Compliance
with 11 U.S.C. §§ 1102(b)(3) and 1103(c) filed by Robert T.
Schmidt on behalf of Official Committee of Unsecured Creditors
of General Motors Corporation

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HEARING re Application of the Debtors for Entry of Order
Pursuant to 11 U.S.C. §§ 327(a) and 328(a) and Fed. R. Bankr.
P. 2014 Authorizing the Retention and Employment of LFR, Inc.
as Environmental Consultants to the Debtors Nunc Pro Tunc to
the Commencement Date

HEARING re Application of the Debtors for Entry of Order
Pursuant to 11 U.S.C §§ 327(a) and 328(a) and Fed. R. Bankr. P.
2014 Authorizing the Retention and Employment of Brownfield
Partners, LLC as Environmental Consultants to the Debtors Nunc
Pro Tunc to the Commencement Date

HEARING re Application of the Debtors for Entry of Order
Pursuant to 11 U.S.C. §§ 327(a) and 328(a) and Fed. R. Bankr.
P. 2014 Authorizing the Retention and Employment of The Claro
Group, LLC as Environmental Consultants to the Debtors Nunc Pro
Tunc to the Commencement Date

HEARING re Application under 11 U.S.C §327(e) Authorizing
Debtors to Employ and Retain Jones Day as Special Counsel for
the Debtors, Nunc Pro Tunc to the Petition Date

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HEARING re Application of Debtors for Entry of Order Pursuant
to 11 U.S.C. §§ 327 (e) and Fed. R. Bankr. P. 2014 Authorizing
Retention and Employment of Baker & McKenzie as Special
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HEARING re Application of Debtors for Entry of Order Pursuant
to 11 U.S.C. § 327(e) and Fed. R. Bankr. P. 2014 Authorizing
Retention and Employment of Lowe, Fell & Skogg, LLC as Legal
Counsel Nunc Pro Tunc to the Commencement Date

Transcribed by: Lisa Bar-Leib

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P R O C E E D I N G S

THE COURT: All right. We're going to deal with the 9:00 calendar on GM at this point. We're going to start with those matters that are wholly unopposed. Then we're going to deal with Karmann -- the Karmann matters. I want to get appearances and then I'll want people to sit down. All right. Who's going to take the lead? Mr. Smolinsky?

MR. SMOLINSKY: Good morning, Your Honor. Joe Smolinsky of Weil Gotshal & Manges for the debtors. I have with me here today my colleague, Stephen Karotkin, as well as our co-counsel from Honigman Miller Schwartz and Cohen. Bob Weiss is here.

THE COURT: Right. Mr. Weiss?

MS. CATON: Good morning, Your Honor. Amy Caton from Kramer Levin Naftalis & Frankel on behalf of the official committee of unsecured creditors.

THE COURT: Good morning, Ms. Caton.

MS. CATON: Good morning. I also have with me my colleague, Jennifer Sharret.

THE COURT: Your colleague's name again, please?

MS. CATON: Jennifer Sharret.

THE COURT: Sharret?

MS. CATON: Yes, Your Honor.

THE COURT: Thank you.

MR. LOMAZOW: Good morning, Your Honor. Tyson

1 Lomazow of Milbank, Tweed, Hadley & McCloy on behalf of Wells
2 Fargo as indenture trustee under the 2001(a) leverage lease
3 transaction.

4 THE COURT: You were speaking very, very quickly.
5 May I get your name again?

6 MR. LOMAZOW: Tyson Lomazow of Milbank Tweed --

7 THE COURT: No. I know Milbank Tweed. Your name,
8 though. Lomenzo?

9 MR. LOMAZOW: Lomazow.

10 THE COURT: Lomazow. All right. Thank you. All
11 right. I don't want appearances from everybody. I want --
12 until people come up to deal with their particular matters.
13 What I would like is on these omnibus motions, to the extent
14 that they're unopposed, let's get them behind us. And then
15 let's take care Karmann which, unless you've resolved it, is
16 going to be time consuming. Let's go. Mr. Smolinsky?

17 MR. SMOLINSKY: Your Honor, if I may suggest --
18 again, Joe Smolinsky. What I'd like to do is provide a short
19 status conference with respect to the various cure objections
20 which remain on the calendar. And then to dispose of the
21 rejection motion other than Karmann, which, as you stated, will
22 be left over. And then Mr. Weiss has one motion that I believe
23 is unopposed as well.

24 THE COURT: Okay.

25 MR. SMOLINSKY: If I may approach, Your Honor?

1 THE COURT: Yes.

2 MR. SMOLINSKY: Your Honor, I provide this summary
3 just to assist us in walking through the status. If Your Honor
4 may recall, as part of the sale motion, there were a large
5 number of objections to cure an assumption and assignment that
6 were filed. We continue to notice a small number of remaining
7 contracts. And under the procedures, parties have ten days in
8 which to object. We also, as I think we noted for Your Honor,
9 we are not holding contract counterparties to the strict ten-
10 day deadline as a result of various arguments that notices were
11 sent to the wrong address and people need more time. So we've
12 been fairly accommodating in that regard.

13 I just want to walk through where we are. And other
14 than Karmann, we are going to seek to adjourn the remaining
15 objections to a date approximately a month from now in early
16 September. And we very much hope and expect that we will be
17 able to dispose of all the remaining objections without needing
18 court intervention.

19 When we were before Your Honor on June 30th at the
20 sale hearing, there were 627 objections that were filed with
21 respect to contract assumption and assignment. At that
22 hearing, we reported that approximately 315 of those objections
23 were withdrawn for a variety of reasons. Either they resolved
24 their dispute and they formally withdrew their objection; they
25 signed a stipulation of which we presented to Your Honor at the

1 hearing in which they agreed to continue to reconcile outside
2 of the judicial process; and then certain of the stipulations
3 provided that they would, if an agreement wasn't reached, go
4 into an ADR program; and a few provided that they can come back
5 to the Court if their issues were not resolved.

6 Finally, Your Honor, in connection with the essential
7 vendor motion, a number of creditors filed agreements, trade
8 agreements, that, among the various terms, provided that they
9 would deal with any cure objections in an alternative dispute
10 resolution process. So those are also off calendar. And we're
11 making tremendous progress in resolving all of those remaining
12 objections.

13 That left 312 objections as of June 30th. We
14 received thirty-five new objections since that hearing which
15 we've added to the group. And we've separately noticed those
16 parties that today would be the hearing on those objections.
17 Since then, we have formally resolved 106 objections which have
18 been withdrawn formally. As a result -- also, there were
19 sixty-two objections that were deemed to be superseded or
20 amended to former objections which leaves 179 objections on the
21 calendar today. And if you look at the second block, the
22 status of the remaining cure objections today, of the 179, we
23 have signed agreements resolving the cure amounts with respect
24 to twenty-nine of those objections. The agreements require
25 that the counterparty file with this court a withdrawal of the

1 objection and, to date, they haven't done that. We're
2 following up with them to make sure that the docket is clean.

3 There are seventy-two additional objections in which
4 we've reached agreements in principle. And subject to the
5 procedure order, we are documenting those agreements which
6 don't need to come before the Court but once we have those
7 agreements fully documented then the counterparties will
8 withdraw their objection.

9 Your Honor, that leaves seventy-eight objections
10 which are still in the evaluation and negotiation bucket. And
11 we're making headway but we haven't reached agreement yet. And
12 those seventy-eight are the objections that we would hope that
13 we would resolve between now and the adjourned hearing. One of
14 those is Karmann and while we're seeking to adjourn the matter
15 to the next hearing date, Karmann -- we'd like to move forward
16 today with respect to their objection.

17 THE COURT: All right.

18 MR. SMOLINSKY: So, Your Honor, should we check with
19 chambers for an appropriate date?

20 THE COURT: Yes.

21 MR. SMOLINSKY: Thank you, Your Honor. We also have
22 on the calendar today the fourth omnibus rejection motion.
23 There are a variety of different types of contracts that we are
24 seeking to resolve and reject through this motion. We've only
25 received one objection and that is the objection of Karmann

1 which we can deal with as part of the other Karmann matters.
2 We have sought to reject these contracts effective as of today.
3 There was no unique circumstances that would cause us to seek
4 nunc pro tunc relief with respect to that motion. So assuming
5 that Your Honor is inclined to approve the contract rejections
6 that are not disputed, we seek an order today rejecting it
7 effective as of today.

8 THE COURT: Yes. All undisputed ones are motion
9 granted on.

10 MR. SMOLINSKY: Thank you, Your Honor. Now I'd like
11 to cede the podium to Mr. Weiss.

12 THE COURT: Okay. Mr. Weiss?

13 MR. WEISS: Good morning, Your Honor. Robert Weiss
14 of Honigman Miller Schwartz and Cohn, special counsel to the
15 debtors. We are before the Court this morning with regard --

16 THE COURT: Want to pull the microphone closer to
17 you, please, Mr. Weiss?

18 MR. WEISS: We are before the Court this morning with
19 regard to the debtors' motion for entry of an order authorizing
20 rejection of certain personal property agreements and/or
21 abandonment of collateral to secured creditors. These
22 agreements are equipment leases and ancillary agreements and
23 they are identified in Exhibit A to the motion. In particular,
24 they're lease numbers 2001 A-1 and A-2 and 2001 A-6.

25 Only one objection was filed and that's by Wells

1 Fargo Bank in its capacity as indenture trustee. We are
2 pleased to confirm the advice that we gave to chambers on
3 Friday afternoon that the objection has been resolved in the
4 form of a consensual form of order. If I may just very briefly
5 summarize the changes from the original form of order submitted
6 to the Court. The relief requested with regard to leases 2000
7 (sic) A-1 and 2 is consented to. The hearing is adjourned
8 regarding A-6 for the purpose primarily of continuing
9 discussions among the parties to attempt to resolve that issue.
10 The proposed date subsequent to the Court's calendar would be
11 August 18th, 2009.

12 Wells Fargo's arguments are preserved regarding A-6
13 and the Court is asked not to draw any inferences from the
14 objector's stipulation to the relief sought with regard to A-1
15 and A-2. I believe that is the summary of the material changes
16 from the original form of order. Counsel for Wells Fargo and,
17 I believe, would like to address the Court briefly.

18 THE COURT: All right. Mr. Lomazow, you have any
19 problems with what Mr. Weiss told me?

20 MR. LOMAZOW: Your Honor, just to clarify for the
21 record, I believe the reference was to the 2001 A-1 and A-2
22 leases not the 2000 A-1 or A-2 leases. And I also wanted to
23 note that Mr. Weiss' recitation was accurate and, in addition,
24 there is language in the proposed order, Your Honor, whereby
25 Wells Fargo reserves its right to be able to assert claims for

1 administrative rent, rejection damages as well as any potential
2 damages relating to the debtor or New GM's use of the
3 equipment. And we reserve the right to be able to assert these
4 claims including on an administrative expense priority basis.

5 THE COURT: Okay. And Mr. Weiss, you have any
6 problems with what Mr. Lomazow just told me?

7 MR. WEISS: Your Honor, that is all outlined in the
8 form of order that'll be presented to the Court. Obviously,
9 the form of order will control to the extent there's any
10 inconsistency with anything that's been stated to the Court
11 today. The form of order has been reviewed by counsel for
12 Wells Fargo and they are in agreement with regard to its
13 content.

14 THE COURT: Okay. All right then. I'll approve
15 everything you were able to accomplish so far, kicked the
16 remainder. You're going to have to confirm with my courtroom
17 deputy that the date that you want to adjourn to is one that's
18 available. There are a lot of things going on in this court.
19 Subject only to that, everything is fine.

20 MR. WEISS: Thank you, Your Honor.

21 THE COURT: And you can submit the order and floppy
22 to Ms. Blum across the hall --

23 MR. WEISS: Will do.

24 THE COURT: -- and consult with her about the
25 adjourned date.

1 MR. WEISS: Thank you, Your Honor.

2 THE COURT: Okay. What do we have next? Mr.
3 Smolinsky?

4 MR. SMOLINSKY: Again, Joe Smolinsky. I think
5 that -- what we have on the 9:00 calendar are the two Karmann
6 objections, one with respect to the assumption and assignment
7 and, second, with respect to the rejection. Your Honor --

8 THE COURT: Pause, please. Are you going to be
9 arguing for GM?

10 MR. SMOLINSKY: Yes, Your Honor.

11 THE COURT: Okay. Who's arguing for Karmann.

12 MR. KUKLA (TELEPHONICALLY): Good morning, Your
13 Honor. This is Patrick Kukla of the office of Carson Fischer
14 here in Michigan --

15 THE COURT: Right.

16 MR. KUKLA: -- appearing telephonically. And we
17 thank the Court for allowing us to appear telephonically.

18 THE COURT: All right. Well, telephonically is not a
19 problem. Have I gotten everybody who's going to be appearing
20 on this motion? Mr. Smolinsky, you can have a seat for a
21 couple of minutes because I need to address with both of you
22 how we're going to deal with this argument.

23 Gentlemen, I've read all of your stuff including,
24 until I went blind, these contracts that you submitted. One of
25 the things that I'm going to want each of you to address is why

1 neither party quoted the language in the contracts upon which
2 it was basing its positions and instead look to me to read all
3 of this stuff by myself.

4 I'm also going to need both sides to address before
5 we get on to the specific questions why there was an inability
6 or unwillingness on the part of either side to comply with the
7 requirements of the case management order which required the
8 opening paragraphs of the submission to tell me what your
9 position is and why you should win as compared and contrasted
10 to giving me paragraph after paragraph of the history of the
11 case. For instance, Mr. Kukla, your assumption motion tells me
12 in paragraph 1 that GM filed a Chapter 11 case on June 1 of
13 this year. Did it occur to you that by this time I might know
14 that? By paragraph 15, on page 5 of your motion, you tell me
15 that your position is that the tooling purchase orders aren't
16 executory contracts. And on paragraph 17, you finally get
17 around to telling me why you believe that.

18 Mr. Smolinsky, the Weil papers aren't much better.
19 Now, neither side, to my considerable frustration, quoted the
20 language upon which its position is based. And when it's your
21 turns to do so, Mr. Kukla, I want you to address the language
22 in the agreements upon which you premise your contention that
23 they're interrelated and interdependent because I got to tell
24 you that despite the fact that I tried to do your work for you
25 and to see the basis upon which you might be making that

1 contention, I couldn't find it. And, Mr. Smolinsky, when I
2 went through all of this stuff, I had analogous problems with
3 your contention that the tooling contract is an executory
4 contract. And I'm going to need help from you as to what are
5 the provisions that create mutuality of obligation. In
6 paragraph 8 of your brief, you say "the period during which the
7 debtors can request performance has not expired". I need help
8 from you as to -- to do what? With what rights and obligations
9 associated with that? Whether you're referring to lines that
10 say this line item is effective from 11 August through -- 11
11 August 2006 to 2009 or what. There are assertions that it's a
12 requirements contract but the language upon which the assertion
13 that it's a requirements contract -- well, I think you're
14 saying it's a requirements contract but I didn't see the
15 language upon which that's premised. I don't see where is the
16 provision obligating GM to buy anything. And on the tooling
17 contract, I need your help as to why this isn't just a pile of
18 purchase orders.

19 So, gentlemen, I'll hear your arguments but you're
20 both going to have to be a lot more specific in terms of the
21 language upon which your respective contentions are premised.
22 Because my tentative, subject to your rights to be heard, is
23 that these three agreements are not in any way, shape or form
24 interdependent or a single contract and that the tooling
25 contract either isn't executory or you haven't shown me what

1 obligations there are on the part of GM going forward.

2 One of the most troublesome parts that I've had
3 understanding is that none of the jargon or abbreviations or
4 code language that's used in these documents has been explained
5 to me. And the promise -- the contractual provisions of a
6 promissory nature have not been pointed out to me. And,
7 indeed, whether the tooling agreement is a one-time -- one-off
8 transaction or series of them or is a framework for repeating
9 purchases and the nature and extent of the repeating purchases
10 was not explained to me.

11 Likewise, I have problems understanding what a line
12 item detail is; what a contract attachment is supposed to
13 signify; what the standard terms and conditions referred to
14 under the contract header number on the third page of the
15 tooling agreement is; what the expression associated with the
16 GM legal business entity and the terms and conditions
17 associated with the line item details for contract number is
18 supposed to mean. On this state of the briefing, gentlemen,
19 I -- despite the fact that I went to law school, despite the
20 fact that I have a degree in industrial engineering and I know
21 something about what tooling is and what gigs and dyes are, I
22 still can't understand what the contractual obligations under
23 the contracts are claimed to be.

24 Now, Mr. Kukla, I need to hear from you first because
25 a lot of this revolves around the extent, if any, to which

1 these agreements are integrated. And I want you first to tell
2 me where in your brief you told me why they are integrated;
3 second, the contractual provisions upon which you base that
4 contention; and then anything else you want to tell me. I know
5 the law in this area. I don't need help in the law. I need
6 help on the facts.

7 MR. KUKLA: Okay. Thank you, Your Honor. With
8 respect to your first inquiry to where in the brief, I
9 believe -- and I apologize if -- I hear the Court's concern as
10 to how it was set forth and the fact that there's no specific
11 language cited in the brief and I apologize for not giving the
12 Court that clarification.

13 Our position, Your Honor, which I hope I set out in
14 the brief, and if I didn't, again, I apologize, is that what
15 Karmann was awarded was a program to do work on the GMX 381.
16 And in connection with that award, there's an obligation to
17 produce production parts and an obligation to produce service
18 parts. And it's our position, again, that in the automotive
19 industry, those two go hand in hand. It's essentially a
20 package deal. Meaning, Karmann would not have been awarded the
21 service parts business had it not been awarded the production
22 parts business. And so, essentially, even the fact, I think --
23 the pricing itself for the service parts which stem from the
24 pricing on its production parts.

25 With respect to specific language, I would refer the

1 Court to the nomination letter, which I know that General
2 Motors' counsel attached to one of their replies and which I
3 forwarded to General Motors' counsel last week when we were
4 having discussions concerning the motions. I believe in there,
5 again, it says that Karmann had been awarded or selected for
6 the retractable car job for the GMX 381 program. And in that
7 document, it sets out that in connection with that, Karmann
8 would be producing both production parts and service parts.

9 THE COURT: Pause, please. Was there a reason why
10 you didn't give me the nomination letter when that is the
11 document upon which you're basing your argument?

12 MR. KUKLA: Quite candidly, Your Honor, at the time
13 that we had to file the objection, I did not have physical
14 possession of it. And not to make any excuses, however, as I
15 think Mr. Smolinsky had stated when he was giving his recital
16 as to the status update on the other objections, there was some
17 confusion in terms of when this notice to assume by the debtors
18 was actually sent to Karmann and, I'm sure the Court is aware,
19 that was stated in the notice there's a ten-day period upon
20 which the objections were to be filed. And there was some
21 confusion as to whether, in fact -- whether we had received.
22 So out of an abundance of caution, we wanted to get our
23 objection on file so there could be no argument that we had
24 somehow, by failing to object timely, had consented to the
25 proposed assumption.

1 THE COURT: All right. Now, Mr. Kukla, you have a
2 copy of the nomination letter in front of you and the
3 underlying contractual documents in front of you?

4 MR. KUKLA: Yes, I do, Your Honor.

5 THE COURT: To what extent do any of the underlying
6 contractual documents mention the nomination letter?

7 MR. KUKLA: I don't believe that they do, Your Honor.

8 THE COURT: All right. Now to what extent -- and
9 again, my problem is that this nomination letter refers to a
10 lot of seemingly jargon in the industry some of which I can
11 guess as to its meaning, some of which I have more difficulty.
12 To what extent had the documents upon which this controversy
13 revolves, the production purchase orders, the service parts
14 purchase orders and the tooling parts service orders, been
15 executed before or after the nomination letter?

16 MR. KUKLA: I believe the purchase orders were all
17 issued subsequent to promptly receiving the nomination letter,
18 Your Honor.

19 THE COURT: All right. Now to what extent, when the
20 nomination letter was drafted, had the purchase orders and the
21 other documents come into being?

22 MR. KUKLA: That much I'm not sure, Your Honor. But
23 I would point out also that we're not strictly relying on the
24 nomination letter itself but, as I'm sure -- I know that Your
25 Honor indicated you had gone through the contracts that had

1 been attached to the debtors' reply. And what the Court will
2 find in reviewing General Motors' standard or bold terms and
3 conditions, which I believe the debtors maintain govern the
4 contractual obligations between the parties, in the production
5 purchase order, which incorporates General Motors' servicing
6 conditions, under Section 20, there is an express obligation on
7 behalf of suppliers, in this case, Karmann, to produce service
8 parts up to fifteen years later. So I think, again, Your
9 Honor --

10 THE COURT: Can you help me find that, please?

11 MR. KUKLA: Sure. That is Section 20, Your Honor.

12 THE COURT: Of what?

13 MR. KUKLA: I believe their terms are standard for
14 all Pos so I don't think it matters particularly which purchase
15 order Your Honor looks at.

16 (Pause)

17 THE COURT: You're not in my courtroom. The pause is
18 because I'm reading it now.

19 (Pause)

20 THE COURT: I don't understand, Mr. Kukla. I assume
21 you're referring to the -- are you referring to the first
22 sentence or the second sentence of paragraph 20? The one I'm
23 looking at is on page 5 of 6.

24 MR. KUKLA: Yes, Your Honor. I have that in front of
25 me.

1 THE COURT: Unfortunately, this is all in just a huge
2 bundle. There's no other way I can refer to it.

3 MR. KUKLA: No. I'm reading the provision I believe
4 Your Honor is reading. I think I would be relying on the first
5 section and also the third -- actually, the remainder of that
6 paragraph. The second sentence, I agree, isn't really
7 appropriate and applicable. But it does say that the seller
8 will sell the buyer goods necessary to forge and fulfill its
9 current miles for every replacement parts required. And there
10 is also a reference during the next fifteen years of
11 obligations to continue to supply service parts. And so, I
12 think, Your Honor, Karmann's position is while we think this is
13 a material issue of fact -- and I'm not quite sure that based
14 on the documents in front of Your Honor that the Court can
15 appropriately decide this matter, a main fact needs an
16 evidentiary hearing. But I think at a minimum, both the
17 nominations letter coupled with the general terms which that's
18 GM own document that they prepared, indicates that the intent
19 of the parties here were that these two are -- this is a
20 package deal, that the fire doesn't get to production parts
21 without being obligated to its service parts. And while for
22 administrative purposes, GM may have felt the need to issue a
23 PO for their need for service parts, I don't believe that that
24 carries the day for them in terms of establishing a separate
25 contractual obligation.

1 We believe they're interrelated and I think that's
2 made clear by Section 20 of their own General Terms.

3 THE COURT: Continue.

4 MR. KUKLA: So our thought, Your Honor, or our
5 position respectfully is that under the main POs, these are --
6 and again, I think the debtors cited in their reply that's the
7 intent of the parties. And I think that's says things for the
8 debtors, Your Honor, is that there's an ambiguity here as to
9 what the parties intended.

10 THE COURT: Well, one thing as to which there at
11 least seemingly isn't an ambiguity is that there's an
12 integration clause in each of these agreements, isn't there?

13 MR. KUKLA: I'm not sure if there is, Your Honor.
14 I'm not disputing that. There probably is. I can't say with
15 certainty that I've seen that provision.

16 THE COURT: Well, I'm reading from one that's number
17 31. It says "Entire Agreement. This contract together with
18 the attachments, exhibits, supplements or other terms of buyers
19 specifically referenced in this contract constitutes the entire
20 agreement between seller and buyer with respect to the matters
21 contained in this contract and supersedes all prior oral or
22 written representations and agreements."

23 This contract comes, as I heard you say, after the
24 nomination letter. And I have some difficulty seeing why
25 paragraph 31 doesn't supersede that. And --

1 MR. KUKLA: Well, Your Honor, respectfully, if
2 that -- if it were the case, I still think that the obligation
3 under paragraph 20 shows that the supply of production parts
4 and the supply of service parts are, in fact, interrelated.
5 And I know that in the debtors' reply they cited a number of
6 different factors which, of course, I've looked at. And quite
7 candidly, Your Honor, I think we need that number if not all of
8 those factors. The consideration for these agreements was
9 interrelated as evidenced by the nomination letter. The
10 contract was not separately negotiated. They all stem from one
11 bid that Karmann made, request for quote, that the debtors
12 would have issued. Karmann bid on it, was awarded the program
13 in its entirety which included the production parts and the
14 service parts.

15 And quite candidly, separate and apart from whether
16 the debtors have issued a separate PO for service parts, under
17 this paragraph 20, Karmann would have been obligated under the
18 terms of the production order to supply the service parts at
19 the prices indicated in the production PO lest the failure to
20 perform on behalf of Karmann, failure to actually provide the
21 service parts would essentially be a cross-default because they
22 would have had a breach of the production purchase order.

23 So again, Your Honor, I think this is -- and I think
24 Your Honor pointed out that it isn't really a legal issue at
25 this point, it's a factual issue. And I think the facts

1 mitigate that, best case for the debtors, there is an ambiguity
2 here to what the parties intended. The debtors haven't
3 provided any supporting affidavit indicating what the intent of
4 the parties were. And I don't believe that the Court can
5 determine the intent of the parties based on the limited record
6 presented at the present time.

7 THE COURT: Well, isn't it something which is equally
8 applicable to both sides? Haven't both sides been dreadfully
9 deficient in giving me any affidavit as to the intent or, for
10 that matter, to even put in the briefs the language that's been
11 relied upon?

12 MR. KUKLA: I agree with that statement, Your Honor.
13 We equally -- neither party has submitted corresponding or
14 supporting affidavits. But again, I think, Your Honor, based
15 on their own documentation which is the nomination letter that
16 they sent to us plus the purchase orders are simply, Your
17 Honor -- their position is that because there's a separate
18 purchase order for service parts and a separate purchase order
19 for production parts, each is its own individual contract. And
20 again, Your Honor, I think in the automotive industry, it's
21 understood that a supplier is awarded a program which would
22 require that they produce both production parts and service
23 parts. And I think that at an evidentiary hearing, Karmann and
24 its top designee could elicit testimony to support that
25 position. But the intent here was that they were being awarded

1 a program to supply production and service parts. And that's
2 the reason why they bid on the award. That's the reason they
3 were awarded the work. And it seems now that what the debtors
4 are doing, and I understand their motive -- but I don't think
5 the Bankruptcy Code allows them to essentially release
6 themselves from the burdens of the contract and leave those
7 with Karmann while accepting the benefit and continuing to
8 compel performance by Karmann under this only limited aspect of
9 the contract.

10 THE COURT: Anything else, Mr. Kukla?

11 MR. KUKLA: No, Your Honor. I appreciate -- again, I
12 thank the Court for allowing me to participate telephonically.
13 And I think I've -- I guess I'd rest on what I've presented to
14 the Court.

15 THE COURT: Okay. Mr. Smolinsky? Main lectern,
16 please.

17 MR. SMOLINSKY: Thank you, Your Honor. Joe Smolinsky
18 for the debtors. Let me start by responding to the integrated
19 argument and then switch to the tooling. Your Honor, I think
20 that there are a few critical elements of these contracts that
21 I think Your Honor should focus on when looking at the three
22 categories of contracts, the production contracts, the tooling
23 and the service parts. Your Honor noted the integration
24 provision and I think that that's the most important provision.
25 Each of the contracts contain integration clauses that provided

1 clearly that the agreements are set forth in the contract and
2 there are no other oral or written understandings besides
3 what's in the contract and the schedules.

4 Second, there are no cross-default provisions which I
5 think speaks clearly to the fact that if the parties intended
6 that one is tied to the other, they would have drafted the
7 contracts in such a way that would have made clear.

8 The third is that all the contracts have different
9 terms. They're not coterminous. So there was always a
10 contemplation that one of the contracts could terminate and the
11 others would stay in place. There are terminations for
12 convenience provisions which allow the party to terminate the
13 contract if the program is to be scuttled. But General Motors,
14 for example, if they were to no longer manufacture this car as
15 they are, they could terminate the contract for convenience.
16 They would terminate the production contracts for convenience.
17 The tooling contracts and service parts contracts would
18 continue. They have their own termination for convenience
19 provisions that would not be exercised.

20 And there's a good reason for that. Even if an OEM,
21 an original equipment manufacturer decided to no longer build a
22 car, they would still have the need to service warranties and
23 other services that they would have to provide to their
24 customers. You may be asking why we didn't terminate for
25 convenience and there are certain payment obligations that

1 would be triggered by termination for convenience that could
2 rise to the level of an administrative expense claim. So
3 that's why we're seeking to reject the production contracts --

4 THE COURT: Now presumably those would still be
5 elements of a damage claim but you would prefer to be defending
6 or have a pre-petition claim.

7 MR. SMOLINSKY: That's correct, Your Honor. So when
8 you look at those three factors, the no-cross default, the
9 integration clauses and the fact that all the agreements have
10 different terms -- and let me speak about paragraph 20 for a
11 minute. My read of paragraph 20 is simply a statement that if
12 Karmann is to get the production of original equipment then
13 they're obligated to continue to provide replacement parts for
14 a period of fifteen years. It does infer that under that
15 provision that the parties will reach agreement as to the
16 salient terms of any future parts provisions beyond the third
17 year. And the fact that we're rejecting the production --

18 THE COURT: What did you mean by the third year?

19 MR. SMOLINSKY: I believe there's a reference in
20 paragraph 20 that the pricing for the third year -- let me
21 just -- it says "Unless otherwise agreed to by the buyer, the
22 price during the first three years shall be those in effect at
23 the conclusion of the current model purchases. For the
24 remainder of the period, the price for goods shall be as agreed
25 to by the parties."

1 But we're rejecting the production contracts which
2 means that we can no longer require them to perform beyond the
3 term of the tooling contracts and the service parts contracts.
4 And the debtors and New GM were aware of that provision and
5 stands here today knowing that if and when the production
6 contracts are rejected that they're not entitled to purchase
7 any of these tooling or service parts beyond the term of their
8 current agreements.

9 THE COURT: Help me understand a few things. And my
10 curiosity, obviously, isn't evidence but it triggers questions.
11 I would have thought that products sold under the production
12 contract would be full assemblies and that stuff sold under the
13 parts service agreement would be individual subcomponents of
14 the larger modules or assemblies. To what extent is my
15 curiosity accurate or inaccurate?

16 MR. SMOLINSKY: That's my understanding, Your Honor.

17 THE COURT: Well, then they're different parts,
18 aren't they? And the price of a module which has been
19 assembled and delivered as a module, on the one hand, has
20 economies of scales associated with it and doesn't have the
21 individual pricing of the components. Anybody who's bought a
22 replacement water pump for a car knows that it costs you more
23 to get an individual replacement than it would cost to buy the
24 total of all of the individual-like components that make up a
25 vehicle. And I don't see how one can be talking about

1 replacement parts at the price as set forth in the contract if
2 the production contract has prices for modules and the parts
3 contract has pricing for individual subcomponents that are
4 parts of those larger modules. I may be using the wrong word
5 because I'm not an automotive engineer. I'm just going back to
6 my industrial engineering experience.

7 MR. SMOLINSKY: I think, Your Honor, it was
8 contemplated in the nomination agreements that was referred to
9 is consistent with this, that the intent was that there would
10 be in place, although I don't think it's a requirement that
11 would be in place a service parts agreement that would provide
12 the terms upon which service parts would be provided.

13 My read of paragraph 20 is the requirement is beyond
14 the production of the car. So if this is a six-year platform
15 for the production of the G-6, the Pontiac G-6, that the
16 production -- that the service part agreement would continue
17 and that Karmann was pledging that after the G-6 program, the
18 platform was terminated so that there were no new G-6s produced
19 that they would continue to supply service parts beyond that
20 date.

21 THE COURT: What's a G-6? A kind of Pontiac?

22 MR. SMOLINSKY: I believe it's a Pontiac convertible.

23 THE COURT: Aha.

24 MR. SMOLINSKY: And this is the retractable roof that
25 sits on that car.

1 THE COURT: Um-hmm.

2 MR. SMOLINSKY: So, certainly, New GM, when they
3 evaluated these contracts to determine whether to take
4 assignment of them, they recognized the import of rejecting the
5 production contracts.

6 THE COURT: Say that again slowly.

7 MR. SMOLINSKY: When New GM evaluated whether or not
8 they would take assignment of these contracts in the three
9 various buckets, they did so cognizant of the fact that by
10 rejecting the production contracts because they were
11 terminating the platform, they were no longer going to produce
12 Pontiacs, that they would lose the ability to purchase service
13 parts beyond the term of their other service part agreements.

14 THE COURT: Um-hmm.

15 MR. SMOLINSKY: And that's why they're not
16 integrated, Your Honor.

17 THE COURT: Now turn to tooling. Again, my curiosity
18 isn't evidence. But I would think that some tooling needs to
19 be replaced because it wears out and other tooling can be used
20 for much longer periods of time. I can't tell from looking at
21 this whether the purchases of the tooling are one-off
22 transactions or are in anticipation of the fact that tooling is
23 going to be provided -- the same tooling is going to be
24 provided over and over again.

25 MR. SMOLINSKY: Your Honor, you may be getting to the

1 edge of my knowledge. I do believe that they purchase tooling
2 periodically. They deliver schedules for how many tooling
3 pieces they need at a time. And the contemplation is during
4 the period of the contract. They would deliver schedules,
5 Karmann would deliver the tooling. I don't know how long it
6 takes to produce the tooling. But it's a periodic purchase
7 that the company makes. Whether that tooling is needed at the
8 dealers or at the company, I don't know.

9 THE COURT: I'm trying to figure out -- well, I'll
10 hear your presentation on the tooling portion. But one of the
11 problems I have is trying to figure out what GM is obligated to
12 do vis-a-vis tooling as an element to determining whether or
13 not the tooling agreement is executory or not.

14 MR. SMOLINSKY: Your Honor, let me speak to that.
15 And I was not expecting that question. And maybe it's a
16 function of working with the company for many months and
17 understanding what's customary and how they do things and how
18 they contract for parts.

19 But, to me, the tooling contract is simply a contract
20 to provide parts pursuant to schedules when they're delivered
21 just like any other automotive part. The company determines
22 how much they need over the course of the next month or several
23 months. They put in schedules. The parts are produced and
24 paid for. And I don't think this contract is much different
25 from any other contracts the company has. I want to just --

1 THE COURT: Well, the question is, is it not much
2 more than a glorified price list coupled with a description of
3 the surrounding terms that will accompany any particular
4 purchase orders?

5 MR. SMOLINSKY: I don't think GM would be happy to
6 hear -- New GM would be happy to hear if your conclusion today
7 is that counterparties to contracts could decide every time a
8 part is ordered whether or not there have been a supply or not.

9 THE COURT: Well, I very well understand that. But
10 my job in life isn't to make people happy. My job is to
11 construe agreements. Now, help me understand where the
12 mutuality of obligation is and where each of the two parties to
13 the contract are obligated to do what the other guy wants him
14 to do.

15 MR. SMOLINSKY: Let me see if I can point out a few
16 provisions, Your Honor. First of all, the term -- and I'm
17 looking to the sample tooling agreement that's attached to the
18 reply.

19 THE COURT: That's the second or the third -- no.
20 It's the second of the three agreements?

21 MR. SMOLINSKY: Yes. Yes, Your Honor. It actually
22 starts -- yeah.

23 THE COURT: Well, give me a second because mine isn't
24 tabbed or anything like that.

25 MR. SMOLINSKY: It says "Contract Header - 1 of 1".

1 THE COURT: Well, the first one's the production
2 contract, isn't it, which also says --

3 MR. SMOLINSKY: Yes.

4 THE COURT: -- "Contract Header"?

5 MR. SMOLINSKY: Yes. But as you keep flipping pages,
6 you get to 5 of 6, 6 of 6 and then it goes to 1 of 6. If Your
7 Honor would like, I could hand it up.

8 THE COURT: I got it. All right.

9 MR. SMOLINSKY: Your Honor, if you look at the next
10 page, it says "This line item is effective from April 24th,
11 2008 through April 24th, 2011." I can represent to you that it
12 doesn't take four years to make one part. So the first thing
13 I'd like to point out is that the purpose of this contract was
14 to stay in place through 2011. It wasn't a simple purchase
15 order to produce one part.

16 The second thing I'd like Your Honor to focus on, if
17 you flip to the next page, it says near the bottom of the page,
18 it says "Quantity, 1; Base Price, 22,000." I think I can
19 represent to you that they didn't just buy one tool for 22,000
20 dollar, that this was -- the quantity per each unit of tooling,
21 the price would be 22,000 dollars which suggests that it's an
22 agreement to produce parts during the term for that price.

23 The next thing that I'd like to point Your Honor to
24 is -- if you flip to page 3 of 5.

25 THE COURT: Of the contract attachments?

1 MR. SMOLINSKY: Yes. It says at the top 3 of 5. And
2 paragraph 13 is "Termination for Convenience".

3 THE COURT: Um-hmm.

4 MR. SMOLINSKY: If this was a simple purchase order
5 to purchase one part, there would be no termination. Once you
6 order, you order. And it's produced and you pay and you're
7 done. The termination of convenience gives rights to both
8 parties. It says that GM has the right to terminate a contract
9 whenever it wants. But it can't just not do that. It can't
10 just go to another supplier during that period. It needs to
11 terminate for convenience which requires GM to do certain
12 things, to pay certain amounts.

13 THE COURT: Well, that's certainly true in part. But
14 tooling manufacture requires design, unless it's out of a stock
15 design, fabrication, gathering up raw materials, machining or
16 otherwise creating the tooling, and so forth, so that even if
17 it were a purchase order, a seller could be stuck with work in
18 process or having incurred costs prior to the delivery or
19 acceptance of the tooling, couldn't it?

20 MR. SMOLINSKY: That's right, Your Honor. That's why
21 when you produce for a platform -- and I think the way GM would
22 look at it is the platform for parts is as long as they're
23 going to produce that car. The platform for tooling and for
24 service parts are well beyond the requirement for producing the
25 cars because they have to continue to service the cars that are

1 on the road. And that's why you saw paragraph 20 which, if we
2 reject the contract, the production contract we're not going to
3 be relying on and the tooling contract which sets the price for
4 tooling during this period. And I think that that can be read
5 in conjunction with paragraph 3 which is on the immediate
6 preceding page which talks about delivery schedules and when
7 schedules are delivered. And it says "Time is of the essence
8 and delivery shall be made both in quantities and times
9 specified in buyer schedule."

10 So for GM, they agreed to a price. They agreed to
11 pay certain amounts if they stop purchasing and terminate for
12 convenience. And, in exchange, Karmann agrees to accept
13 delivery schedules when they're received and time is of the
14 essence and they're required to produce the parts and deliver.
15 To me, that's a contract. And, to me, it's executory until the
16 termination of the contract by its terms, which is 2011, under
17 at least this contract.

18 MR. KUKLA: Your Honor. I apologize for
19 interrupting. Can I have an opportunity to address the tooling
20 issue?

21 THE COURT: When it's your turn.

22 MR. KUKLA: Okay. Thank you, Your Honor.

23 THE COURT: Mr. Smolinsky, if you look at the service
24 parts agreement that's further on in your package, it says on
25 what seems to be some kind of cover page, it says "Consolidated

1 Contract". It says that "buyer agrees to purchase at the price
2 upon and subject to the terms and conditions on the face and
3 reverse side hereof approximately the percentage shown on the
4 attached exhibit the buyer's requirements". It seems to walk
5 and talk and quack like a requirements contract. Is there any
6 similar language in the tooling agreement that, in my review of
7 it, I missed?

8 MR. SMOLINSKY: If you look at page 1 of 1, in the
9 middle --

10 THE COURT: 1 of 5 or 1 of --

11 MR. SMOLINSKY: No. 1 of 1. I'm sorry. It's the
12 first page of the tooling contract. And in the middle of the
13 page, it says "Contract Header number 1F5T0".

14 THE COURT: Yes.

15 MR. SMOLINSKY: Right below that, it says "This
16 contract sets forth the exclusive terms and conditions under
17 which seller shall sell and buyer shall purchase the goods or
18 services described in the line item detailed in this contract
19 for the period specified therein. I think that's the corollary
20 provision. And one more note. The reason why these contracts
21 look different is that different parts of GM would enter into
22 different types of contracts. This isn't one unified contract.
23 I'm not even sure the parties spoke to each other when they
24 entered into all of them. There are the SPO, the service parts
25 organization group that would work on the SPO contract.

1 There's the manufacturing department which would work on the
2 tooling. And the production group would work on the platforms.
3 So I read that --

4 THE COURT: Mr. Smolinsky, with respect -- I mean,
5 this is like a classic price list and terms list provision. It
6 doesn't say anything about GM being required to purchase all of
7 its requirements, does it? Did I miss the word "requirements"?
8 It says these are the terms under which seller is going to sell
9 this stuff. That seller is going to sell this stuff during the
10 time period specified. And it sure looks, walks and talks like
11 what you learn as a first year law student or study when people
12 are putting terms into their purchase orders and you got to
13 battle the forms. In fact, it looks to me like this is a
14 textbook example of how to win a battle of the forms in the old
15 Article 2 UCC sense.

16 MR. SMOLINSKY: Your Honor, I understand your
17 argument. Are you saying --

18 THE COURT: I'm not arguing with anybody. I'm just
19 trying to understand what these documents say since neither you
20 nor your opponent have given me any affidavits or any
21 assistance in this or even given me a headstart on looking at
22 the provisions that I should be focusing on.

23 MR. SMOLINSKY: I'm trying to understand whether Your
24 Honor is looking at whether or not this is an exclusive
25 agreement which is -- I think you're suggesting there's nothing

1 in here that says that GM would purchase all of their parts.

2 THE COURT: I'm trying to find out what GM is
3 obligated to do.

4 MR. SMOLINSKY: I believe that what GM is obligated
5 to do is to pay a particular price per part and to --

6 THE COURT: Well, if you're talking about something
7 that is already ordered, of course. But the question is to
8 what extent does GM have to buy a single additional part from
9 Karmann.

10 MR. SMOLINSKY: I would infer that if they stopped
11 buying parts from Karmann and either go to another supplier or
12 stop in its entirety that there would be an argument that they
13 are obligated to pay the termination for convenience payments
14 because, in that case, Karmann didn't get the benefit of their
15 bargain which is to stand ready to produce parts through 2011
16 at the price of 22,000 per tool. And if they're not getting
17 that business and they still have to stand ready and put their
18 capacity at risk then they are entitled to get paid for it.
19 And that's what the termination for convenience provision seeks
20 to do. This is not a simple pricelist where GM could just walk
21 away and say, look, I don't really want to buy from you
22 anymore. I don't like the way you're handling things. There's
23 a contract. And that contract sets out very explicitly the
24 terms and conditions upon which the schedules can be met. Now,
25 Karmann's not happy because there's no minimum. There's

1 nothing that says that we have to order ten thousand tools per
2 year or there's an upset price, there's a breakage price. But
3 that's just the terms of the deal. But I stand here very much
4 believing, and this is why I was not anticipating this
5 question, that there is an obligation that GM was to purchase
6 their tooling from Karmann and that Karmann would be -- stand
7 ready to do it. And if GM chose to go a different way, there
8 would be consequences. There would be, effectively, a
9 reimbursements of all of their costs of setting up. I think
10 that that's the quid pro quo under a contract.

11 THE COURT: Um-hmm.

12 MR. SMOLINSKY: And there was offer and there was
13 acceptance. If Your Honor's uncomfortable, we can have an
14 evidentiary hearing. I don't want to --

15 THE COURT: Well, we may have to but -- by the way,
16 where is the acceptance by Karmann on these documents? Are
17 they countersigned in a fashion that I missed?

18 MR. SMOLINSKY: Give me one minute.

19 THE COURT: I mean, I see there are places for
20 Karmann's signatures but I don't see any signatures. Well, I
21 see there are places on the parts contract. I didn't see any
22 on the tooling contract. And I don't remember seeing one on
23 the production parts -- or production modules contract.

24 MR. SMOLINSKY: I should know the answer to that,
25 Your Honor. I don't. I think it might be electronically

1 but --

2 THE COURT: All right. Okay. What else you got, Mr.
3 Smolinsky?

4 MR. SMOLINSKY: Nothing, Your Honor. As I said, I
5 don't mind -- when I read these contracts, I read them with the
6 understanding of working with the company and understanding how
7 they do things. If Your Honor feels that an evidentiary
8 hearing is necessary, we, of course, will accommodate that. I
9 would ask that on the integration issue there were at least --
10 that Your Honor would rule on that. I think that the items
11 that I highlighted for you which shows that there are several
12 contracts is fully supported by your Adelphia decision and
13 Second Circuit affirmants. And, therefore, I would like to ask
14 that Your Honor find that the contracts are -- at least the
15 service contracts -- service parts contracts are in full force
16 and effect because I believe that Karmann has stopped
17 delivering parts based on the pendency -- and based on the
18 pendency of this objection, we have not assumed and assigned
19 these contracts yet. So we would like some relief in that
20 regard. I think if Your Honor finds that they are separate
21 agreements then we can go ahead and at least assume and assign
22 the parts contract which I don't think are in dispute except
23 for the integration provision if Your Honor is inclined to have
24 a trial on the tooling contracts.

25 THE COURT: Okay. Mr. Kukla?

1 MR. KUKLA: Thank you, Your Honor. I'll be very
2 brief. With respect to the tooling, I believe if you look at
3 the tooling purchase order, it indicates at the top left-hand
4 corner the standard spot buying. And in the automotive
5 industry, again, I think if we had an evidentiary hearing, we
6 could -- Karmann could elicit testimony in support of this that
7 there were not schedules or releases issued for tooling, that
8 tooling is a spot buying order. So that, when Your Honor looks
9 at the tooling contract, the only tool that they've purchased
10 is a tool that's identified in that contract at the price
11 that's identified therein.

12 And with respect to the terms, it does say the
13 numbers -- often times, you know, it's a very lengthy time as,
14 I believe, Your Honor mentioned, with respect to engineering,
15 development, design costs to get a tooling up and running.
16 Once the tool has been fabricated, that's not the end of the
17 process. Then the tool has to go through the parts production
18 approval process, PPAP, before the OEM or the cure one over
19 issued the tooling purchase order would have an obligation to
20 pay. So it does take a number -- it could be a number of years
21 for a tool to actually be designed, built, tested, PPAP-ed,
22 given final approval and then actually use to kick off the
23 right and production parts. And I think -- again, in an
24 evidentiary hearing that could be established. But there are
25 not schedules or releases with respect to tooling. There may

1 be schedules and releases with respect to production parts and
2 service parts. These all are typically your requirements
3 contract or a blanket order where basically the supplier is
4 shipping to the releases needed by the OEM.

5 Here, they need a tool to kick off the production
6 parts. And that's the first step in the process.

7 THE COURT: Yeah. I understand that. But the
8 question is to what extent does the same tool have to be
9 resupplied either because of wear, breakage or something of
10 that sort and to what extent have the parties bound each other
11 to further purchases of that nature?

12 MR. KUKLA: Respectfully, Your Honor, again, I think
13 maybe an evidentiary is needed. But my review of these
14 purchase orders and my understanding from the automotive
15 industry and from speaking to my client is that Karmann's
16 obligation under the tooling has been completed. And if GM
17 needed additional tools, they could issue additional purchase
18 orders for those tools. Or issue an engineering change
19 order -- in fact, I think some of these purchase orders are, in
20 fact, in your change order where they're simply asking for a
21 modification or a revision to the tool to either correct some
22 issue that they had discovered in production, either needs to
23 be corrected, or to make a design change in the finished
24 product that's going to delivered.

25 And it's not surprising, Your Honor, for a tooling to

1 cost 22,000. In fact, if anything, that's on the low end.
2 Those tools are -- the actual cost is much, much greater than
3 that. So the fact that the number in some of these Pos may be
4 22,000 dollars, may be higher, doesn't, in our mind, evidence
5 that that is not -- that that's a schedule or release but
6 rather is a spot buy PO for one particular tool.

7 THE COURT: Or per unit. I mean, if you're
8 suggesting that it's for multiple tools, of course that's the
9 case. But parties could agree that for every gig or every
10 fixture or every other kind of tooling that you're talking
11 about, you're going to pay 22,000 dollars per unit, can't they?

12 MR. KUKLA: Well, I would think if that was the case,
13 Your Honor, I think they would -- one, there would not be
14 anybody to spot buying. It should be identified as a
15 requirements contract or a blanket order. And it should be
16 evidenced in the tooling purchase order itself. And it seems
17 to me that the only thing the debtors are relying upon is the
18 line item at the top of the purchase order which indicates that
19 in some cases, I think Mr. Smolinsky indicated, a date of 2011.
20 And I think, again, it sometimes does take a number of years
21 for a tool to be designed, fabricated and, in fact, go through
22 the parts production approval process.

23 So, again, our position, Your Honor -- and again, we
24 agree that it's an issue of fact. And I think that goes for
25 the entire issue that we've presented argument on today and

1 that an evidentiary hearing may, if fact, be needed not just on
2 tooling issues. We believe also on the issue of the
3 integration between the purchase order -- the production
4 purchase order and the service parts purchase order. And with
5 respect to paragraph 31 of General Motors Terms and Conditions
6 which, I believe, Mr. Smolinsky cited, while that may, in fact,
7 act as an integration clause, I guess the issue still is what
8 is the contract that's being integrated. We believe, again,
9 that we can elicit testimony that in the automotive industry,
10 you know, these are package deals. Production parts, service
11 parts, they go hand in hand. There's no reason -- I mean, they
12 only aren't just a source of service parts to one supplier and
13 a source of production parts to a different supplier. So,
14 again, we believe these are integrated. I think our position
15 is that it is a genuine issue of material fact that would
16 require evidence rather than the record that's in front of the
17 Court presently. And I acknowledge that both sides are equally
18 at fault for the record that the Court has in front of it so
19 I'm not trying to excuse ourselves from that. But I do believe
20 that there is a genuine issue of material fact on both issues
21 as to at least with respect to the purchase orders, production
22 and service parts POs, as to what the parties intended. With
23 the tooling, I think, again the contract is clear that this is
24 spot buying. However, I concede that that is also an issue of
25 fact.

1 THE COURT: Now let's talk about your overall
2 position. You agree that Old GM doesn't make cars. So it
3 doesn't need convertible tops. And, in fact, even soon, if not
4 already, New GM isn't going to be making Pontiacs. So
5 basically, you're saying, what, that because these can't be
6 separated even though there is no purpose in life at all for
7 either company to take on continuing obligations on the
8 production agreement that Old GM, Motors Liquidation Company,
9 doesn't have the ability to reject this contract?

10 MR. KUKLA: I think they have the ability to reject
11 the entire contract. And it will -- also I apologize. I meant
12 to mention this before as one point of clarification. Mr.
13 Smolinsky had mentioned that Karmann was not presently
14 shipping. There was no confusion last week as to -- because my
15 client has been contacted by New GM and our position was
16 pending the objection. We have not had a contract with New GM.
17 We discussed this issue with GM's special counsel, the Honigman
18 firm, and we confirmed as of last Friday that, in fact,
19 beginning today, Karmann will resume shipment.

20 THE COURT: All right.

21 MR. KUKLA: So hopefully that addresses that issue.

22 THE COURT: Well, that's obviously very helpful.
23 Now, let's say if you got your wish -- if I rule that they are
24 integrated -- I mean, the last thing that any sane manager at
25 either Motors Liquidation Company or New GM would want to do

1 was to keep buying convertible tops for Pontiacs. So
2 presumably, the next measure in this little chess game is that
3 then if you're right then Old GM terminates for convenience and
4 pays you for your existing inventory. Is that what you're
5 looking for?

6 MR. KUKLA: Well, I think, Your Honor, that would be
7 the end result is that either they assume the contract --
8 really, I mean, if they assume the contract in its entirety --

9 THE COURT: Well, that would be idiotic. I couldn't
10 approve that -- that would not pass any business judgment test
11 and the creditors' committee would be screaming if I ever
12 allowed that to happen. Actually, they would be screaming
13 beforehand and, therefore, I would never let that happen.

14 MR. KUKLA: Well, then I think the option would be,
15 as Your Honor is identifying, if they reject the contract, if
16 they were to reject the contract as a whole and then New GM can
17 negotiate with Karmann with respect to a service parts that it
18 needs going forward.

19 THE COURT: And you want to play that game of chicken
20 and you want me to give you the legal terrain upon which you
21 can do it.

22 MR. KUKLA: Well, I -- respectfully, Your Honor, I
23 don't believe it's a game of chicken. We've agreed we're going
24 to resume shipment. But with such confusion as to who would be
25 purchaser, that has been clarified through our discussions with

1 counsel. We are going to resume shipment. The only issue is,
2 again, we don't believe that they can take the benefit of the
3 contract without the burden of the contract. And if they
4 reject the contract then we would have -- they could enter a
5 few negotiations and we could enter into a new contract to
6 provide them with their need for service parts.

7 THE COURT: All right. Anything else, Mr. Kukla?

8 MR. KUKLA: Nothing, Your Honor. Thank you.

9 THE COURT: Mr. Smolinsky?

10 MR. SMOLINSKY: Your Honor, I just stand to add one
11 more thing to the record. When I was reading the acceptance
12 provision, I read it quickly when I was standing up here. The
13 acceptance provision, which is paragraph 1 of the tooling
14 contract --

15 THE COURT: Of which contract?

16 MR. SMOLINSKY: The tooling contract. It's page 2 of
17 5. It says "Seller has read and understands this contract and
18 agrees that Seller's written acceptance" -- and I didn't go any
19 further but it says "or commencement of any work or services
20 under this contract shall constitute Seller's acceptance of
21 these terms and conditions only." So I don't think anyone
22 would dispute the fact that services have commenced. The only
23 issue, I think, is whether or not this is one 22,000 dollar
24 part that takes four years to build or whether this is a
25 contract under which schedules are delivered from time to time

1 during the duration of the term. And we've been told that it
2 is the latter. Thank you, Your Honor.

3 THE COURT: All right. I will dictate something
4 today. But in order to do what I need to do, I would need to
5 take a recess. And I still have a full courtroom on the dealer
6 motion. We're going to take ten minutes and then I'm going to
7 take the dealer motion. And then after I've heard the argument
8 on the dealer motion and dealt with that in some fashion, I'll
9 be back to you on how we're going to deal with this.

10 All right. We're in recess until a minute or two
11 after 10:30.

12 (Recess from 10:21 a.m. until 10:37 a.m.)

13 THE COURT: Okay. On the dealers motion. The motion
14 will be granted with respect to those who did not object, which
15 is in the ballpark of twenty-seven dealers. I may have the
16 numbers slightly off. And I will take appearances for the
17 remaining objectors. And then I'm going to ask you to sit
18 down, I'm going to have some preliminary comments. All right,
19 who's going to be speaking for the debtors on this one? Mr.
20 Smolinsky?

21 MR. SMOLINSKY: Good morning, Your Honor. Again, Joe
22 Smolinsky of Weil Gotshal & Manges for the debtors.

23 THE COURT: Okay. Do I have people here on behalf of
24 the dealers?

25 MR. SKIRROW: Yes, Your Honor.

1 THE COURT: Come on up to a microphone, please.

2 MR. SKIRROW: Good morning, Your Honor. My name is
3 Juan Skirrow of Hoguet Newman Regal & Kenney and I represent
4 Everett Chevrolet.

5 THE COURT: All right. That's the one in Washington
6 State?

7 MR. SKIRROW: Yes, Your Honor.

8 THE COURT: Okay.

9 MR. DAVIS: Jeffrey Davis, Your Honor, on behalf of
10 Ford, Buick, GMC and Forrest Chevrolet Cadillac.

11 THE COURT: Right. Anybody else? Okay. If there
12 had been more than two people appearing on behalf of dealers I
13 would have asked that you work very hard to coordinate your
14 presentations. I think with only two I need to simply ask you
15 to avoid duplicative argument and to focus on facts you unique
16 to your particular clients.

17 Folks, my preparation was vis-a-vis the five, or six,
18 or seven, or eight objections that I reviewed. And I am not in
19 a position now to narrow my comments down to the two of you who
20 are here. But when I hear from everyone I want you to address
21 the following questions and concerns that I have.

22 First of all, from the perspective of the objectors,
23 believe me I fully understand the hardship of what losing one's
24 dealership franchise can mean. But the case law and,
25 especially, Judge Gonzalez' decision in Old CarCo and my

1 decision last week, which I fully recognize is not officially
2 reported, in the mining company case, all underscore the fact
3 that except in those very few areas where Congress has told us
4 differently, we bankruptcy judges aren't allowed to consider
5 individual hardship to a particular contract counterparty.

6 Likewise, the preemption arguments were likewise
7 ruled upon in Old CarCo, and Judge Gonzalez, as in TWA,
8 addressed the difference to which we bankruptcy judges must
9 give business judgment. I need the dealers to channel their
10 arguments -- in light of that; I must say that I was struck by
11 the lack of attention to Old CarCo. In fact, I thought Mr.
12 Munits (ph.) was the only one of all of the objectors who
13 addressed it in any substantive way, and he's not here anymore,
14 and his matter has been continued or resolved.

15 So we have a case that is on all fours with the one
16 that's on here, except for the fact that that case ultimately
17 approved a harsher regiment for the dealers than the one that's
18 been advocated here. So when the dealers have their turn I
19 need you to focus on those things and help me understand
20 whether you're asking me to rule that Judge Gonzalez' decision
21 in Old CarCo was wrong, or what.

22 Now, several people talked about when they cited Old
23 CarCo, they said affirmed, and then they cited the Circuit
24 Court decision of a week before Old CarCo was issued. I don't
25 know what's going on there. I don't understand Old CarCo to

1 have been affirmed by the Circuit, but it is, nevertheless, a
2 decision of a fellow bankruptcy judge in this district, and you
3 know from my prior written decisions how much I focus on
4 precedent in this district.

5 Now, the dealership in Everett Washington has the
6 potential for raising distinguishable issues. Let me pull out
7 the file on that one.

8 The language from, both CarCo and TWA, says that
9 business judgment is respected in the absence of bad faith whim
10 or caprice. The Superior Court Judge, I think his name was
11 Lucas, in Washington State, found GMAC guilty of bad faith.
12 But to my knowledge, made no express finding or even an implied
13 finding that was brought to my attention, that GM has
14 contrasted to GMAC, had been guilty of the conduct that he
15 found so objectionable, vis-a-vis GMAC.

16 But by the same token counsel for the Everett
17 Chevrolet dealership asked me to draw the inference that GM was
18 a participant with GMAC in doing the bad things that GMAC did.
19 And I need both side's views as to what I should be doing about
20 an allegation of that type when juxtaposed against the fact
21 that it's obvious that Motors Liquidation Company isn't making
22 cars anymore, doesn't have the ability to sell cars through a
23 dealership even if it wants to, that decisions as to which
24 dealerships to take on by assignment can only be regarded as
25 those of New GM. And I need to balance those two.

1 Certainly, I don't rule out the possibility that when
2 GMAC did the bad things that it did, it did so in consultation
3 with GM. I can't make such a finding on this record, if I ever
4 could. But I guess the question is do I need to give Everett
5 Chevrolet and evidentiary hearing even though it wouldn't
6 seemingly be appropriate for the remainder.

7 Subject to your rights to be heard, it appears that
8 the adverse findings against GMAC are established that I can't
9 sit as a Court of Appeals of those rulings, and that we have to
10 assume that GMAC acted badly.

11 The issue is the relevance of that finding to this
12 process, and whether it is necessary or appropriate for me to
13 permit discovery as to the complicity or approval of GM and the
14 GMAC acts as directed toward GMAC. Certainly, the findings as
15 far as they were made on GMAC are very damning. But the
16 question is whether I should simply say, you know, go after
17 GMAC and get a zillion dollar punitive damages award against
18 GMAC or whatever, or whether I should also tag the innocent
19 creditors of this estate which GMAC's conduct, assuming for the
20 sake of argument that GM was complicit in the bad things that
21 GMAC did.

22 Was it Mr. Reivman?

23 MR. SKIRROW: No, Your Honor, Mr. Skirrow. I'm of
24 Mr. Reivman's firm.

25 THE COURT: But your name was Starrow?

1 MR. SKIRROW: Skirrow, S-K-I-R-R-O-W.

2 THE COURT: Okay, Mr. Skirrow.

3 MR. SKIRROW: I am a part of --

4 THE COURT: Well, no, that's fine. It's just that
5 when you gave your appearance before I didn't get your name, as
6 obvious from my question. And I'll hear from you and Mr.
7 Davis. But I want to hear from Mr. Smolinsky first.

8 MR. SMOLINSKY: Thank you, Your Honor. Again, Joe
9 Smolinsky for Weil Gotshal & Manges for the debtors.

10 Your Honor, treatment of the dealers in these
11 bankruptcy cases have been discussed at length. There are a
12 lot of data in the record already. The dealer rationalization
13 program was discussed at length in the first-day affidavits of
14 Frederick Henderson. Mr. Henderson gave testimony at the sale
15 hearing. In addition to the statements in our motion to reject
16 the dealer agreements and our reply.

17 Your Honor, thank you for granting relief with
18 respect to those dealers that did not object. Just for the
19 record, I wanted to just put on the record the agreements in
20 principle that have been reached since the motion has been
21 filed so that the record is clear.

22 If you look at the amended agenda for today, response
23 filed number M, which is the First United Inc. opposition.

24 THE COURT: Uh-huh. That's the dealership in
25 Elcohan, California.

1 MR. SMOLINSKY: Yes, Your Honor.

2 THE COURT: Suburban San Diego.

3 MR. SMOLINSKY: Yes. The reason for the rejection
4 seemed to center around the fact that they were four
5 dealerships in the immediate area, and there were performance
6 issues. Nevertheless in discussions, we have agreed to -- or I
7 should say New GM has agreed to provide this dealership with a
8 participation agreement to allow it to go forward. So we've
9 adjourned this matter to the August 18th calendar to allow the
10 papering of the deal between New GM and the dealer. And that
11 should resolve the objection.

12 THE COURT: Okay.

13 MR. SMOLINSKY: Letter N is objection of D'Andrea
14 Buick. This dealership agreed to sign the modified wind-down
15 agreement. The reason why it modified is to take into account
16 events that have occurred since the motion was filed, and since
17 the notice was given that the dealership would be on the wind-
18 down list. And, again, we would ask that that matter be
19 adjourned to August 18th to allow a papering of that settlement
20 between New GM and the dealer.

21 Lastly, Your Honor, the objection of Mt. Kisco
22 Chevrolet. They're also signing a modified wind-down
23 agreement, and that matter will be adjourned to August 18th as
24 well.

25 So, Your Honor, I think as you properly pointed out

1 there are a number of key undisputed facts. I just want to
2 highlight them. Number 1, the treatment of the dealers was not
3 an arbitrary process. This is the exact situation where the
4 business judgment has been fully vetted and understood and
5 implemented. As we cite in our motion in our reply papers, the
6 first cut was a formulaic cut; where dealers were given scores
7 for their performance. You may hear something about DPS
8 scores; which is a weighted average of various factors of
9 performance, including number of cars sold compared to what
10 would be expected of that dealer. Whether the dealership is
11 properly capitalized, and whether it's profitable.

12 Second, the company reached out to every dealer who
13 didn't sign either a participation agreement and a wind-down
14 agreement. There was also a business case survey where the
15 company discussed each dealer and whether or not the dealers
16 should get a participation agreement that would allow for the
17 dealer to go forward with New GM or whether it would get a
18 wind-down agreement. The wind-down agreements were put into
19 place to provide a soft landing for dealers that would not go
20 forward. It comprised various considerations, including a
21 payment of 1,000 dollars for every car in inventory. It
22 provided reimbursement of rent for a period of time. And in
23 exchange the dealers would keep their doors open and sell off
24 their inventory in the ordinary course.

25 So when wind-down agreements were not signed the

1 company reached out to every dealers; tried numerous, numerous
2 times to try to get them to sign the wind-down agreement, or at
3 least to understand what its terms were. There was an appeal
4 process. Several dealers who were on the wind-down list were
5 given an opportunity to submit materials to GM. And in many
6 cases, GM reversed its decision and gave them participation
7 agreements.

8 And I think the company, while very sympathetic, and
9 I think there's been a lot of reports about the dealer
10 treatment, of course, these are sympathetic stories; people
11 losing their businesses. But I think that the company has done
12 all that they possibly could, and New GM has supported that
13 endeavor to make sure that there will be a soft landing for as
14 many as possible.

15 So, Your Honor, we're left with six objections. I
16 think I've established through our papers that it has not been
17 an arbitrary process.

18 Number 2, during the sale process, the purchaser
19 designated contracts for assignment and the purchaser agreed to
20 take on and take assignment of all participation agreements for
21 the dealers that are going forward. But, in particular, also
22 took assignment of all wind-down agreements to give the dealer
23 certainty for those that were exiting, that they would continue
24 to get the support of New GM as they wound down their dealers.

25 The third undisputed point is that as a result of the

1 sale the debtors no longer have a right to sell or distribute
2 GM vehicles. Therefore, they cannot perform any of their
3 obligations. If they were compelled to assume the agreements
4 that are active during the Chapter 11 case prior to objection.
5 And it bears noting with respect to our timing, we filed this
6 motion on the 6th of July, which was the day after Your Honor
7 issued the opinion which approved the sale. Prior to that
8 date, we didn't feel comfortable to filing a rejection motion
9 and identifying dealers that would no longer be going forward,
10 and didn't sign wind-down agreements. So once Your Honor
11 approved the sale we immediately filed the motion. We made
12 that motion effective on the 10th, which is the date that the
13 sale closed and the date after which GM, the debtors, could no
14 longer perform their obligations under the dealer franchise
15 agreements. So we tried to give the dealers as much time as
16 possible within a very narrow band of opportunity.

17 Number 4, as I mentioned the dealers made every
18 reasonable effort to cause the dealers not going forward to
19 sign the wind-down agreements. And as Your Honor had noted in
20 the decision approving the sale, that the alternative treatment
21 of the participation agreement certainly -- and even the wind-
22 down agreement was better than the alternative for the dealers
23 of rejection.

24 Lastly, as Your Honor noted, the prevailing law in
25 this circuit in Chrysler is on all fours. It provides a clear

1 mandate that Section 365 trumps and preempts state franchise
2 laws. We recognize that to the extent that Your Honor approves
3 the rejection that damages may be determined under state law,
4 but what we're here before is to exercise one of a debtor's
5 core and basic rights to reject burdensome contracts or
6 contracts that they could no longer perform under.

7 THE COURT: Pause, please, Mr. Smolinsky. As you
8 pointed out the ability to reject burdensome agreements is one
9 of the most fundamental rights of a debtor-in-possession. It
10 may turn out after hearing all of the argument that I would
11 agree with you and sustain the debtors' rights to reject these
12 contracts. Has GM given any thought as to whether if I
13 determine that yes GM has the right to reject but, of course,
14 that gives rise to claims against the estate, that the
15 objectors here might still be able to get deferred termination
16 agreements, wind-down agreements if they decide to give up any
17 rights to appeal and, in essence, see the light?

18 MR. SMOLINSKY: Your Honor, it's an excellent
19 question. And I think it's clear from the way that we've
20 handled at least four of the dealers, resolved their issues,
21 that New GM has not abandoned the idea that they want to see
22 the right thing done in the circumstance if they can. I will
23 tell you with respect to the wind-down agreements, they
24 typically contemplate that the dealer will stay open for a
25 period of time, and that benefits the New GM in that the

1 dealership will remain open, the cars will not be surrendered
2 to GMAC or other parties that may wholesale floor plan
3 financing, that would then put the cars back to GM. So there
4 is a -- when New GM took assumption and assignment of the GMAC
5 agreements, they have this obligation to take back cars that
6 are -- that are surrendered.

7 Certain of the dealers that we agreed to modify wind-
8 down agreements for, no longer had their cars, they already
9 surrendered them to GMAC. And, accordingly, the amount that
10 was made available was lessened because of those factors.

11 I cannot speak for New GM here, today. I would hope
12 that they would endeavor to -- if the counterparties were
13 amendable to make offers available for the wind-down consistent
14 with their prior practice, as modified. That's all I can
15 really say on the subject.

16 THE COURT: Fair enough. Continue, please.

17 MR. SMOLINSKY: Your Honor, I think I will focus my
18 comments on the two dealers that are here today.

19 First, Everett. Your Honor, Everett, I think, and
20 obviously I'd like to hear their comments. They're the ones
21 that are involved in the GMAC litigation. They also raise the
22 fact that GM has been discriminatory in that this dealership is
23 owned by an African-American, and, therefore, there was some
24 discrimination and bad faith based on that.

25 Our counter is that this dealer has had poor

1 performance. And none of the dealers that are on this list
2 have had numbers that come anywhere close to the breakpoint
3 where they would be considered to go forward as a dealer with
4 New GM. This dealer sold 117 cars, fewer than expected. It's
5 DPS score is 49.96. Now, the DPS score, as I mentioned before,
6 is the weighted numbers taking into account profitability,
7 capitalization, and sales. So for this dealer in 2008, as I
8 said, it had a DPS score of 49. That was based on expected
9 sales of 404 vehicles during the year. It sold 287.

10 It is undercapitalized by two million dollars based
11 on New GM's calculations. And it was not profitable during
12 that period.

13 So we think that based on that scoring, that the
14 inference should not be that there was something untoward in
15 how the company exercised its business judgment, but rather,
16 the inference should be that there was no differentiation
17 between this dealer and others.

18 In order for a dealer to be considered going forward,
19 a DPS of a 100 is considered average. Those dealers that made
20 the cut have scores of seventy and above. So this dealer falls
21 significantly below that breakline. And, therefore, the
22 inference should be that since it lost a million dollars in the
23 last year that it should -- that the decision was not based on
24 nefarious determinations.

25 With respect to the GMAC litigation, I -- we haven't

1 briefed this at length and we'd be happy to submit to the
2 Court, but there have been subsequent pleadings filed with
3 respect to the GMAC action. This is not our issue. When GMAC
4 saw the papers that were filed by Everett, they contacted us
5 and wanted us to know the facts.

6 THE COURT: Excuse me, Mr. Smolinsky. You mean,
7 subsequent papers in the Sonoma County Superior Court?

8 MR. SMOLINSKY: Actually, in the Court of Appeals for
9 the State of Washington, Your Honor, Division One.

10 THE COURT: That like being an intermediate appellate
11 court?

12 MR. SMOLINSKY: I believe so, Your Honor, yes. And
13 in this appeal which was a discretionary interlocutory appeal,
14 the Court found that there may have been errors at the trial
15 level. I will not characterize the papers, I have them
16 available if Your Honor would like to read them. But it looks
17 like the Appellate Court had concerns about errors committed at
18 the trial court, and, therefore, the grounds for appeal had
19 been satisfied and that the appeal is going to go forward. And
20 there's a twelve-page decision on the finding of the possible
21 errors by the trial court, which I can hand up, if Your Honor
22 would like. Or we can submit after the hearing.

23 But I think as Your Honor noted, there is no
24 correlation. I can't sit here today and say no one at GM spoke
25 to anyone at GMAC. But GMAC is a separate company operating

1 with separate management. And we do not believe that GM was
2 involved in any way, nor were they implicated in those events.

3 With respect to the allegation of discrimination, I
4 would only note that Mr. Henderson testified before Congress
5 that there are actually more minority dealers on a percentage
6 basis after the dealer reduction process than before. So,
7 again, I think the inference can be drawn that we did not -- or
8 that New GM did not target out or single out minorities. But,
9 in fact, at worst, it was not a factor and resulted in a higher
10 percentage of minorities.

11 I believe the other dealer is Forrest.

12 THE COURT: Right.

13 MR. SMOLINSKY: Your Honor, we reached out to Forrest
14 several times about today's hearing, but didn't receive a
15 response. Their main argument is that they're a solid
16 dealership, not -- it wasn't a sound exercise of business
17 judgment. The debtors didn't explain the evaluation process.
18 They raised the preemption argument and believe that it should
19 be treated as an adversary proceeding.

20 Your Honor, this dealer's performance is woeful. The
21 best based on the data we reviewed, that was put together by
22 GM. If you look at the DPS score, this dealer sold 603 cars
23 less than what was expected. Their target was 1044 vehicles,
24 they sold 441.

25 THE COURT: You said was expected, in the past.

1 Expected by whom?

2 MR. SMOLINSKY: By GM. GM sets targets based on what
3 they would expect in the market, historical population
4 demographics. And it's all part of the rating system that GM
5 goes through to evaluate dealers. And as I said, if they score
6 100 or more they're considered an average performing dealer.

7 If you look at the capital requirements they're
8 undercapitalized by 2.6 million dollars. And they had losses
9 last year of 1,834,000 dollars. That results, when you add it
10 all together in the weighted averaged, a DPS score of 21.65.
11 Nowhere close to the seventy that was the break point.

12 If you look back at 2007 their DPS score was 39.62.
13 If you look back at 2006 their DPS score is 49.73. So, Your
14 Honor, based on the evaluation process, based on the record of
15 the formulaic as well as the non-formulaic evaluation of
16 dealerships, we believe that New GM exercised their discretion
17 appropriately. However, as we have discussed at length before
18 this Court, these decisions were not debtor decisions. These
19 decisions were based on what New GM saw -- envisioned for the
20 company going forward. And that Old GM, the debtors, have no
21 way to perform and have no choice but to reject this contract.

22 Unless Your Honor has any questions?

23 THE COURT: No, you can reply if need be. Mr. Davis,
24 I think I'd like to -- Ms. Caton, come on up here.

25 MS. CATON: Good morning, Your Honor. Amy Caton from

1 Kramer Levin on behalf of the official committee of unsecured
2 creditors.

3 Your Honor, I just have a couple of brief comments on
4 this motion. The committee does support the debtors here. And
5 while we sympathize with the dealers' plight, we think that the
6 debtors have no choice but to reject these contracts.

7 We of Kramer Levin have the unique position here of
8 being involved in, both Chrysler and GM, so we did review the
9 order that the debtors are requesting entry of to make sure
10 that it was at least as favorable to the rejected dealers as
11 the order was in Chrysler. And the language that we requested
12 be added to this order is on page 3 of the so order paragraph
13 at the beginning of the page, in subparagraph (d). And it
14 just -- it clarifies the fact that with respect to the affected
15 dealers that they're not waiving any of their rights or
16 defenses with respect to the debtors' exercise of their rights
17 under the dealer agreements.

18 And I believe that with that addition that we had
19 requested, that this order is at least as favorable to the
20 rejected dealers as the order was in Chrysler.

21 THE COURT: Okay.

22 MS. CATON: Thank you, Your Honor.

23 THE COURT: Mr. Davis, may I hear from you first,
24 please.

25 MR. DAVIS: I also would like to point out that Mike

1 Forrest of Forrest Dealerships is present in court as well.

2 Your Honor, I understand what you said about no
3 individual hardship should be considered by this Court.

4 However, the Ninth Circuit in In re Pomona Valley Medical Group
5 has stated, "There may be cases where the disproportionate
6 damage to the party whose contract is to be rejected,
7 demonstrates that the debtor-in-possession's decision cannot be
8 based on sound business judgment." And it is our position that
9 there is disproportionate damage to Forrest Dealerships if
10 their contracts were to be rejected. And that is based on a
11 separate agreement that impacts a dealership between GM and
12 Forrest that arises out of a settlement agreement in a federal
13 suit filed by GM when they closed Oldsmobile down.

14 THE COURT: Slow down and speak a little louder
15 please.

16 Now, I got your point about the Ninth Circuit's
17 Pomona decision. But the next thing you were saying, there is
18 a separate agreement that has the effect of particular
19 hardship.

20 MR. DAVIS: There are actually two exclusive use
21 agreements arising out of a federal suit filed by GM when the
22 Oldsmobile line of vehicles was phased out. The Forrest
23 dealerships did not sign the agreements with regard to
24 termination of winding down the Oldsmobile line of dealerships,
25 so GM filed suit in Dallas -- in Federal Court in Dallas, and a

1 settlement was raised whereby for a fifteen-year exclusive
2 period each of the respective dealerships is to service the
3 line of vehicles with regard to those dealerships irregardless
4 of anything. And those agreements still stand today. And at
5 this point with the motion, GM is not seeking to dissolve those
6 contracts and do away with those. And what the Forrest
7 dealerships is left with is continuing to service Pontiac,
8 Oldsmobile, GM, GMC, Chevrolet, Cadillac, Buick vehicles and
9 not get paid. In fact, that's --

10 THE COURT: When you mean service, you mean repair,
11 as contrasted to sell?

12 MR. DAVIS: Yes, Your Honor.

13 THE COURT: And what a dealer typically does when it
14 does a warranty repair, it does the work and then it goes to
15 the manufacturer to get reimbursed for the work?

16 MR. DAVIS: Correct, Your Honor. And at this point,
17 GM is refusing to pay for warranty and other work -- for
18 warranty repairs, and there's around 15,000 right now that is
19 outstanding, both pre and post-petition as my understanding.
20 Of course, that work is now being performed under the franchise
21 agreements as well as under both of these exclusive use
22 agreements. And that will impose a hardship absolutely on the
23 Forrest dealerships. If they're forced to maintain the
24 entirety of their acreage that -- there were actually two
25 dealerships, two different buildings, that they're on to

1 continue to only service these vehicles. The exclusive use
2 agreement also provides they can't sell any other lines of
3 vehicles. And so they can't go and arrange an agreement with
4 some other entity to sell vehicles. So they're stuck only
5 servicing vehicles and maintain the facilities for that only.
6 And that is an extreme hardship, and that is a matter that GM
7 has not at all touched upon or responded to in their reply
8 to -- their response to our objection.

9 With regard -- the same is by Judge Gonzalez. A
10 little hamstrung to be able to response to this. Because it's
11 my understanding from talking to the assistant of the Texas
12 Attorney General's Office that they reached an agreement with
13 regard to their objection to the sale motion that GM made, with
14 regard to how Texas law would apply to dealerships and they
15 possibly going forward. I'm not privy to that agreement, I
16 haven't seen it; so I don't know what those agreements are. So
17 it's hard for me to respond, Judge, to any questions that you
18 have with regard to how Texas law may apply here and Judge
19 Gonzalez' ruling in Old CarCo.

20 With regard to the GMAC and GM matter, I want to
21 start back into the year 2005 when GM began it's employee
22 pricing program, which is also the timeframe at which --

23 THE COURT: When GM began it's what program?

24 MR. DAVIS: Employee pricing program. At that time
25 the GM suit in Dallas Federal Court was also ongoing with

1 Forrest. At that time there was a spike in the sales by
2 Forrest -- for the Forrest dealerships, which approximately two
3 months before the mediation took place, out of which the
4 exclusive use agreements were generated, GMAC came in and
5 said -- immediately demanded 1.2 million dollars in payment
6 based upon alleged three-day payment arrangements, of which
7 there's never been any production in writing, it never was
8 shown to any --

9 THE COURT: Did you say GMAC, though, as contrasted
10 to GM?

11 MR. DAVIS: Yes, Your Honor. And at that time GMAC
12 was the wholly-owned financial subsidiary of GM. So it appears
13 that GM and GMAC were working in concert. Whether it was a
14 more favorable resolution in mediation or to put forth out of
15 business, it's unknown. But the monies were paid and Forrest
16 continued to do business.

17 In addition, around that same timeframe, Forrest
18 underwent a process of trying to consolidate the Pontiac and
19 Buick dealership from one location where they were renting
20 property to another location where they owned property. Which
21 they ultimately succeeded and built a 3.2 million dollar new
22 facility for the Pontiac, Buick and GMAC lines of automobiles.
23 It took a while but finally that relocation was approved by GM.
24 And with the debt service on that building can be a reason why
25 we have a lower profit shown in the years 2006 and 2007.

1 As far as the current matters are concerned in 2008,
2 the middle part of the year, GMAC pulled its financing for the
3 floor plan of the Forrest dealership. What that did was that
4 caused GM not to send anymore vehicles to the Forrest
5 dealerships, thereby -- that's why you have 603 less than
6 expected sales by Forrest in 2008. Because for half of the
7 year they were receiving no new vehicles from GM.

8 As far as the capital requirements. I don't know
9 where they're getting the 2.6 million dollar under. There are
10 no facts. There's nothing stated in the response to our
11 objection at all, or to the motion, itself, to state what the
12 capital requirements are and what matters they looked at. And
13 that is part of our response as -- as how we respond to these
14 factual matters which the Court needs to determine whether this
15 was a business judgment decision, is where we undercapitalized.
16 We have a new facility, we have about ten million dollars in
17 property that we're sitting on, how are we undercapitalized at
18 this point in time.

19 And the last matter I want to bring up before the
20 Court is, I believe as of Friday GM has announced it made a
21 mistake in its rationalization of what it looked at in giving
22 dealers wind-down agreements and terminating certain
23 dealerships. The numbers that I understand are at least fifty
24 if not more. So they've pointed out that we've made flawed
25 decisions. However, we know that we haven't made a flawed

1 business judgment decision in this case because we don't know
2 the facts and we don't know the factors that they looked at
3 when they decided to close these dealerships down, including
4 the Forrest dealerships. And of which Forrest dealership is a
5 rural dealership which is a backbone of GM.

6 As Frederick Henderson stated before Congress, we
7 also carefully considered our dealer network coverage, rural
8 areas, and small towns, of which Cleburne is a town around
9 30,000 individuals which has a market to a number of other
10 small towns, only ranging in size from a couple of thousand;
11 about five or six versus urban suburban markets. We know that
12 our strong presence in rural areas, small towns and hub towns
13 gives us a strong competitive advantage on average of more than
14 ten points in market share. And we would like to maintain that
15 advantage. They're going to lose that advantage, Your Honor,
16 in Cleburne. Because what the market area that Forrest
17 services is left with is a Ford dealership and directly across
18 the road a Dodge Chrysler Jeep dealership.

19 Business judgment we believe dictates that Forrest be
20 provided an agreement to proceed forward with the New GM, and
21 that's what we're asking the Court to do. Especially in light
22 of the fact of the exclusive use agreement where they're bound
23 to service these vehicles for at least another ten years and to
24 maintain their property only for these types of vehicles.

25 THE COURT: Okay. Thank you, Mr. Davis.

1 MR. DAVIS: Thank you, Your Honor.

2 THE COURT: All right, Mr. Skirrow.

3 MR. SKIRROW: Good morning, Your Honor. Based on
4 Your Honor's comments, I'm going to tailor my presentation.

5 I'm going to start off by saying that Everett
6 Chevrolet does not seek to argue against the entire regime or
7 whether the entire regime is in accord with the business
8 judgment rule.

9 What's clear here is that the actions that GM took
10 against Everett Chevrolet are in bad faith. And when you have
11 that you have an exception to the business judgment rule.

12 Your Honor asked well, how can GMAC's actions -- how
13 can they somehow be tied up with whatever actions GM would like
14 to take? And I think there are -- I mean, the
15 interrelationships between the two entities here are extensive.
16 Probably the most important one is the fact that GM's decision
17 to reject Everett Chevrolet's dealership agreement is
18 predicated on information that GMAC gave it, it's predicated on
19 the performance -- on Everett Chevrolet's performance, which
20 was hamstrung and affected by GMAC.

21 THE COURT: Well, pause, please, Mr. Skirrow. If
22 you're saying that your client was adversely affected by the bad
23 things that GMAC did and that GMAC's conduct made it much
24 harder for your client to make money, I understand that. But
25 as I understand the standard, what you need to show is bad

1 faith by GM, so you've got to show more than cause and effect,
2 you've got to show some complicity or approval or ratification.
3 I'm not trying to fine tune the words, but to use words in
4 contrast to simply picking up on bad performance that GMAC
5 caused. Do you understand the distinction I'm making?

6 MR. SKIRROW: Yes, Your Honor. And I will get to
7 that.

8 THE COURT: Okay.

9 MR. SKIRROW: First, I would like to read Your Honor
10 a statement from the debtors' reply papers. And it says on
11 page 15 the bottom of paragraph 30. "Ultimately while the
12 result of a collaborative effort, the decision of which dealers
13 to retain was the decision of New GM and not the debtors." It
14 was a collaborative effort. Now, specific bad faith, we have
15 specific bad faith by GM. The debtor -- these bad faith acts
16 began at the end of 2007. The debtor wished to purchase a
17 property from GM at the end of 2007.

18 THE COURT: Wait, I lost you. The debtor is GM.

19 MR. SKIRROW: I'm sorry. Everett Chevrolet wished to
20 purchase the property on which the dealership stood from GM.
21 It approach GM in August 2007 with this plan and it sought
22 financing from GMAC for this purchase. And in May 2008 --
23 May/June 2008 GMAC announced that it would not finance the
24 deal. And what ended up occurring was it was more profitable
25 for GM to sell the property to a third party as part of a large

1 portfolio sale then it was to go ahead with the transaction
2 with Everett Chevrolet. And it was -- so that was one of the
3 bad -- very clear bad acts by GM.

4 The Judge in the Washington trial, Judge Lucas, saw a
5 pattern of bad faith by GMAC. GMAC until recently was owned to
6 a large extent by GM. And the activities -- if you look at the
7 acts in the record GM's actions parallel GMAC's. I mean, they
8 dovetail very closely. So you've got this bad real estate
9 deal. And then you see that GMAC decides to pool -- I'm sorry,
10 GMAC decides to pool Everett Chevrolet's financing in early
11 December '08. The same day that GMAC terminates Everett
12 Chevrolet's credit to the very next day, GM immediately and
13 without notice freezes Everett's open account. GM also refuses
14 to supply vehicles to Everett Chevrolet.

15 So you have GMAC and GM acting over a long period of
16 time in conjunction with each other. And you have a decision
17 to not allow one of the top two dealerships in the
18 Everett/Seattle area to allow them to participate in the New
19 GM.

20 I was kind of surprised when debtors' counsel said
21 that Everett Chevrolet was a poor performer. Everett Chevrolet
22 is one of the two top dealerships in the Everett/Seattle area.
23 It has been profitable every year from 1996 to 2007. And we
24 suggest that but for these bad faith acts on the part of GMAC
25 and GM that it would have been very easy for Everett Chevrolet

1 to be at least in the top two-thirds. Everett Chevrolet is one
2 of the top two dealers. It's in the top five percent of
3 dealers in the Everett/Seattle area. So it seems very
4 incredulous for debtors' counsel to suggest that Everett would
5 not have met that threshold performance standard.

6 And then debtors' counsel throws out this 117 cars
7 fact. He says that Everett Chevrolet had a DPS score of 49.96
8 and sold 117 fewer cars than expected in 2008. Well, it should
9 be no surprise that that happened given that as the judge in
10 the Seattle case said, given that GMAC was attacking constantly
11 Everett Chevrolet's working capital. And it also shouldn't be
12 a -- I mean, that kind of performance, 117 cars for a
13 dealership that 100 -- let's see -- for a dealership that sold
14 nineteen million by October 2008. What I'm --

15 THE COURT: Wait, time out. How many cars did
16 Everett Chevrolet sell in --

17 MR. SKIRROW: I don't have a number, Your Honor.
18 What I --

19 THE COURT: I assume it wasn't in the millions.

20 MR. SKIRROW: Of cars, no, Your Honor. I'm talking
21 about dollars. Nineteen million in sales is what we've --

22 THE COURT: No, then I lost you.

23 MR. SKIRROW: What I'm --

24 THE COURT: How many cars did you client sell in
25 2008?

1 MR. SKIRROW: I don't have an exact number, Your
2 Honor, I can obtain that for you.

3 THE COURT: Can you give me ballpark?

4 MR. SKIRROW: Nineteen million divided by the average
5 sale --

6 THE COURT: Value of a car.

7 MR. SKIRROW: So take nineteen million divided by --

8 THE COURT: And that was 20,000 in fair price?

9 MR. SKIRROW: Sure. I'll take twenty, Your Honor.

10 (Pause)

11 THE COURT: All right, go on.

12 MR. SKIRROW: Okay. So I believe that number 117 is
13 less than ten percent of a years worth of performance. And so
14 if -- even given all the hamstrings that were placed on Everett
15 Chevrolet, if the credit had not been cut off and GM had not
16 stopped sending cars, even under debtors' scenario Everett
17 Chevrolet may have sold enough cars -- may have sold more than
18 117 extra cars. That's really not a huge number. 117 is less
19 than ten percent. Would represent less than ten percent of
20 what Everett Chevrolet sold in 2008.

21 So I think the long and short of it is Everett
22 Chevrolet is a successful dealership, and it's very hard on
23 these papers and based on the factors that were used -- we
24 received no support. No numbers, no documents that allow us to
25 go behind the numbers; and I really think it's implausible to

1 imagine that Everett, but for these bad acts would not have
2 succeeded.

3 And, so, what we request, we request two things. The
4 main thing that Everett Chevrolet wants is it wants a
5 participation agreement. It wants to continue its business.
6 It's a reputable dealership, longstanding ties in the
7 community. And it's one of the successful African-American
8 businesses in this country. That's its main goal. And Your
9 Honor can rule now that it's entitled to a participation
10 agreement, that would be wonderful. Otherwise, at a minimum we
11 request that it be given an evidentiary hearing so that it
12 could ask for very focused document discovery and so that it
13 can take witness testimony and cross examine witnesses.

14 Let me look at my notes and see if I have addressed
15 all Your Honor's questions.

16 Your Honor mentioned that -- posed a query as to how
17 the debtor could -- should or could be required to take on this
18 dealership agreement, assume it if it's no longer producing
19 cars. Well, I think the debtor's already said that New GM
20 has -- with respect to some other objecting dealers has agreed
21 to provide or has agreed to modification wind-down agreements,
22 I propose that the debtor take -- assume the dealership
23 agreement and that work it out with the New GM.

24 And I also think -- I think the defense is a little
25 disingenuous. How can the consummation of a bad act be a

1 defense? I mean, the fact that the bad act has been brought to
2 completion shouldn't be a defense. Right now we should be
3 entitled -- Everett Chevrolet should be entitled to see -- to
4 figure out what happened and to determine whether it was
5 treated inequitably and unfairly. And that this decision-
6 making process be show the light of day.

7 I don't think I have any other comments, Your Honor.
8 I would be more than happy to answer your questions.

9 THE COURT: No, no thank you. I'll take reply. Mr.
10 Smolinsky.

11 MR. SMOLINSKY: Thank you, Your Honor. If I can
12 speak to Everett first. Joe Smolinsky again.

13 Your Honor, first with respect to the GMAC situation,
14 which I think counsel does a good job of making something out
15 of nothing, again, there's no implication that GM had anything
16 to do with this. The action that has been pending in
17 Washington is a Replevin action, relating to the exercise of
18 remedies by GMAC as a secured creditor against the cars for
19 breach of a demand not. Failure by this dealer to repay its
20 obligations to GMAC. And the Court of Appeals for the State of
21 Washington, and the commissioner's ruling granting motion for
22 discretionary review, finds -- I'm just going to read one
23 paragraph. "GMAC had demand notes, the trial court did not
24 otherwise. GMAC demanded payment, which Everett did not make.
25 There's nothing in any of the financing contracts that

1 obligates GMAC to make other loans to consider alternative
2 business structures or to explain its reasons for asking for
3 changes to Everett's capitalization. Whether GMAC's action
4 make business sense is irrelevant to the issue of whether it
5 may demand payment. Everett may or may not have a cause of
6 action for interference with the business expectancy or some
7 other tort. But such a claim is also irrelevant to the issue
8 of whether GMAC could demand payment. It thus appears despite
9 its statements to the contrary that the trial court added a
10 good faith defense to the demand note and that it's decision,
11 therefore, conflicts with Badgett (ph.) and Allied. GMAC has
12 shown probable error."

13 I just read that, Your Honor, for background. We
14 know nothing about that action. But it doesn't sound like this
15 was GMAC conspiring with GM to make loans to this dealer, have
16 the dealer default, and then have GMAC exercise remedies.

17 With respect to the collaboration of parties,
18 obviously the portion that was read from the reply is the
19 collaboration between the purchase and GM in determining which
20 dealers should go forward in the New GM, and not collaboration
21 between GM and GMAC. As a matter of fact, I can represent that
22 we participated on numerous counts of -- telephone conferences
23 with our friend, Mr. Helfadt (ph.), representing GMAC, and GMAC
24 business people, where they were trying to find out which
25 dealers were on the various lists. The wind-down list, the

1 non-wind-down list, because they were concerned about fraud and
2 vehicles disappearing. And time and time again GM provided no
3 information to GMAC.

4 So the best that GM was prepared to do was when GM
5 filed this motion. We provided a copy -- an e-mailed copy of
6 the motion to GMAC when it was filed so that they could take
7 the necessary steps to ensure the protection of their vehicles.
8 But that's it. To suggest that GMAC and GM, together, decided
9 which dealers would go forward has just no basis in fact.

10 So, Your Honor, it sounds like what Everett is
11 seeking is an audience with New GM to determine whether GM
12 would provide Everett with a dealership franchise agreement.
13 And they're welcome to do that. I understand that there was a
14 fulsome opportunity to appeal, to discuss the numbers. And I
15 don't know whether Everett didn't take part in that, or did
16 take part in that. And, ultimately, the decision by New GM was
17 to not go forward.

18 But, again, this is the debtor standing here today
19 seeking to reject a contract that it cannot perform under.

20 With respect to Forrest, I would just note -- and,
21 again, we tried to reach out to counsel for Forrest, but as
22 part of our motion we're seeking not only to reject dealer
23 franchise agreements, but also seeking to reject ancillary
24 agreements, which we agree and we've agreed with the committee,
25 includes exclusive use agreements. So they're concern about us

1 or New GM enforcing an obligation that they can't sell other
2 brands is not founded --

3 THE COURT: But would evaporate if your motion were
4 granted?

5 MR. SMOLINSKY: By the rejection of the ancillary
6 agreements, yes, Your Honor. The only issues come up if the
7 property is owned by a subsidiary of New GM, where the
8 dealership sits, where there may be limitations. But I don't
9 believe that Forrest is one of those dealers.

10 THE COURT: I didn't follow that part.

11 MR. SMOLINSKY: There are lease agreements where a
12 subsidiary of GM owns dealerships and leases --

13 THE COURT: Owns the land on which the dealership is
14 situated?

15 MR. SMOLINSKY: Correct. And there, there may be
16 agreements that may restrict brand usage. And the subsidiary
17 called Argunot (ph.) would make its decisions, you know, as
18 they were brought to them.

19 THE COURT: Well, that sounds like it has a potential
20 for a catch-22, doesn't it?

21 MR. SMOLINSKY: Well, it's to -- these are strategic
22 sites that GM had acquired over the years. But I don't think
23 that these issues are implicated at all in Forrest. I think
24 that property is owned by the dealership or leased by the
25 dealership, or someone else.

1 So there is no exclusive use that would restrict
2 Everett -- I'm sorry, restrict Forrest from conducting its
3 business or opening up another auto dealership.

4 With respect to the warrant claims, I think it was
5 15,000 dollars. There was an issue as to warranty claims that
6 were submitted for work done after the effective date of the
7 rejection that we're seeking, which is the 10th. Other than
8 that, I believe, the company -- New GM assumed all of the
9 obligations through the closing date for warranty provisions.
10 We'd be happy to look into that issue for them. But that may
11 be the basis for that claim.

12 And unless you have any questions, Your Honor.

13 THE COURT: Okay. No, I don't. All right, everybody
14 had a chance to speak their piece?

15 All right. I'm going to take a recess. I think
16 you'll be well served to take a long lunch. And I want
17 everybody back at 1:00. I can't guarantee you how much I will
18 have accomplished by then, but I think that's what I would like
19 to do. We're in recess till then.

20 (Recess from 11:40 a.m. until 1:51 p.m.)

21 THE COURT: I apologize for keeping you all waiting.
22 In this contested matter in the jointly administered Chapter 11
23 cases of Motors Liquidation Company and its affiliates, Motors
24 Liquidation moved to reject its franchise agreements and
25 associated agreements, such as exclusive use agreements, with

1 thirty-eight dealer counterparties whose franchise agreements
2 were not assumed and assigned to New GM and where the dealers
3 declined to execute the wind down agreements that Old GM
4 offered as an alternative to rejection.

5 By reason of developments since the filing of the
6 motion three dealers were carved out of the motion and Motors
7 Liquidation now seeks that relief with respect to thirty-five
8 dealers. After review of the record and the undisputed facts,
9 I conclude that with respect to thirty-three of the thirty-five
10 the motion must be granted. The motion is granted with respect
11 to the thirty dealers who did not object and also three of the
12 five who did.

13 With respect to one of the remaining two, Forrest
14 Chevrolet, which argues that it cannot respond to Motors
15 Liquidation's observations, that Forrest Chevrolet's
16 performance was quite substandard, I will be continuing the
17 motion without either granting it or denying it at this time.
18 I will require Motors Liquidation to provide Forrest Chevrolet
19 with the information upon which the decision was based.

20 Forrest Chevrolet will then have the opportunity to
21 submit that evidence with a brief, if it's of a mind to, to
22 show, if it can, that Motors Liquidation's decision as to
23 Forrest Chevrolet was made in bad faith. Likewise, Motors
24 Liquidation will have the opportunity, is if it of a mind to,
25 to submit an opposing brief after which I'll decide whether

1 Forrest Chevrolet shall be treated any differently than the
2 others.

3 With respect to Everett Chevrolet, the motion
4 likewise will be continued, without either granting it or
5 denying it at this time. AS Everett's Chevrolet requested,
6 Motors Liquidation will provide similar information to
7 Everett's Chevrolet so that Everett Chevrolet, too, will be
8 aware of the information upon which the decision as to it was
9 based.

10 Also, Everett Chevrolet will be able to take
11 reasonable discovery to determine the extent, if any, to which
12 GM was complicit in any bad faith conduct, engaged in by GMAC.
13 As contrasted to simply acting on a financial condition that
14 may have been affected by GMAC's conduct. Everett Chevrolet
15 will also be entitled to reasonable discovery to inquire
16 whether Motors Liquidation acted to reject Everett Chevrolet's
17 franchise out of racial animus.

18 As before, Everett Chevrolet will have the right to
19 submit whatever supplemental evidence it has, along with a
20 supplemental brief, to show that it should be treated
21 differently than the other dealers and Motors Liquidation will
22 have the opportunity to respond, including the right to say, if
23 it is of a mind to, that any bad faith doesn't affect Motors
24 Liquidation's ability to reject.

25 The following are my findings of fact and conclusions

1 of law in connection with this determination. As facts, I find
2 that GM, referred to for clarity by many as Old GM and now
3 known as Motors Liquidation Company, entered into franchise
4 agreements with about 6,000 dealers.

5 Substantially all of GM's retail sales are through
6 its network of independent retail dealers and distributors.
7 Some of those dealers marketed one GM brand, such as Chevrolet,
8 Buick, Cadillac or the like and others marketed several. The
9 363 transaction contemplated the assumption by GM and the
10 assignment to new GM of dealer franchise agreements relating to
11 approximately 4,100 of Old GM's 6,000 dealerships modified in
12 ways to make the surviving GM more competitive. Those modified
13 agreements were frequently referred to as participation
14 agreements.

15 But New GM was unwilling to take all of the dealers
16 on the same basis as it believed that in order to compete
17 effectively, in a more competitive and challenging market, it
18 needed to slim down or "rationalize" as it put it, its dealer
19 network. That is, to reduce its dealer network and to proceed
20 with a lesser number of dealers.

21 Old GM and New GM determined in a collaborative
22 effort which dealers franchise agreements would be assumed and
23 assigned by a formalized process relying heavily, not
24 exclusively, on objective criteria. Those criteria included
25 dealership sales measured against other dealerships of a

1 similar size and in a similar size market in the same state; a
2 customer satisfaction index measured against the average for
3 the region in which the dealership was located; capitalization
4 measured based on the working capital needs of each dealership
5 and profitability.

6 Based on a species of weighted average of those
7 factors each dealership was assigned a dealership performance
8 score, referred to as a DPS with a score of one hundred
9 considered to be average. Dealerships with DPS scores of less
10 than seventy were considered to be significantly
11 underperforming and would not be retained long term by New GM.

12 Other factors taken into account included the sale of
13 non-GM brands under the same roof and who also experienced poor
14 overall performance, sale of discontinued GM brands,
15 dealerships with sales of less than fifty cars per year,
16 dealerships with inadequate or uncompetitive facilities or
17 locations and dealers unprofitable for three years in a row
18 with inadequate working capital.

19 Each of the objecting dealers had a DPS score well
20 below the threshold level of seventy and/or sold less than
21 fifty cars in total during calendar year 2008. For instance,
22 Cardenas sold three vehicles in 2008 and had a DPS score of
23 twenty-three. Terry Gage sold thirty-nine vehicles in 2008 and
24 had a DPS score of about fifty-seven. Quinlan sold twenty-one
25 cars in 2008 and had a DPS of eighty. Forrest had a DPS of

1 about twenty-two in 2008 and DPS scores of about fifty in 2006
2 and forty in 2007 and sold 441 cars, 603 fewer than expected
3 based on its dealership size and market location.

4 GM advised dealers that it would be engaging in this
5 evaluative process and advised them, for those who were not
6 selected to continue, GM would offer them agreements under
7 which their franchises could be brought to an end less abruptly
8 then otherwise would be the case if the dealer agreed as part
9 of that agreement to waive any other claims or legal remedies
10 it might have, including rights the dealer might have under
11 state law unless those rights were unenforceable in bankruptcy.

12 These alternative agreements were referred to as
13 deferred termination agreements or wind down agreements.
14 Dealers whose franchises were not continued were advised that
15 if they didn't enter into wind down agreements their franchise
16 agreements would be rejected. The rejected waivers of rights
17 were disagreeable to the thirty-five dealers who were the
18 subject of this motion. They declined to execute wind down
19 agreements and their franchise agreements were, accordingly,
20 rejected.

21 In one instance there are special facts. Everett
22 Chevrolet had a dispute with GM's financing affiliate GMAC.
23 GMAC provides financing to purchasers of GM vehicles as well as
24 to GM dealers including, though not limited to, for the
25 purchase of vehicles before they are sold by the dealers to

1 consumers.

2 GM has a sixty-one percent interest in GMAC but GMAC
3 and GM are separate companies. In connection with the dispute
4 I just mentioned, GMAC sought and obtained an ex parte TRO in
5 2008 enjoining Everett Chevrolet from selling any cars,
6 basically shutting down Everett Chevrolet's business for two
7 weeks until the order was modified to permit Everett Chevrolet
8 to sell cars and remit proceeds to GMAC.

9 The TRO was thereafter lifted and in the course of
10 further litigation in that matter the Superior Court of
11 Snohomish County, Washington issued substantial factual
12 findings including findings that there was no wrongdoing by
13 Everett Chevrolet and that GMAC acted wrongfully in numerous
14 respects and that GMAC dealt dishonestly, unreasonably,
15 unfairly and in bad faith with Everett Chevrolet.

16 Those factual findings may or may not stand up on
17 appeal or they may turn out to be true as facts but not to have
18 the legal significance to GMAC that was attached to them in the
19 Washington court proceedings. Ultimately, I don't need to find
20 facts of that nature today.

21 So far, as the record in this court reflects, that
22 Snohomish County Superior Court made no similar findings with
23 respect to GM or conduct by GM. However, Everett Chevrolet
24 contends that acts performed by GMAC could not have been
25 performed without the knowledge or assistance of GM. That GM

1 and GMAC were working together and that GMAC's bad faith must
2 be imputed to GM.

3 I'm not in a position, on this record, to make any
4 factual findings with respect to the complicity, if any, of GM
5 and GMAC's acts. Nor am I in a position to sit as a court of
6 appeals with respect to the factual findings of the Snohomish
7 County Superior Court.

8 At this juncture I'm not in a position to rely upon
9 those findings in any way, shape or form other than to find
10 that one judge found that GMAC acted in bad faith and that the
11 circumstances raises as an issue or create an issue without
12 establishing as a fact whether GM might have done likewise.

13 I note that apart from arguments that Everett
14 Chevrolet makes that are not materially different then those
15 raised by other objectors, Everett Chevrolet contends that its
16 facts present unique issues with respect to the debtor's
17 contention that Everett Chevrolet's franchise agreement was
18 rejected in "good faith". And Everett Chevrolet contends that
19 its issues should be treated as a contested matter and require
20 an adversary proceeding, a different thing, with due notice,
21 opportunity for discovery and an evidentiary hearing.

22 I also note that Everett Chevrolet raises concerns as
23 to racial animus in connection with the rejection of its
24 franchise agreement, although it has produced no evidence of
25 any such racial animus or any evidence from which racial animus

1 can be inferred.

2 I now turn to facts applicable to all objectors; one
3 is a hugely important point. Motors Liquidation no longer
4 makes cars and trucks. It no longer makes GM branded vehicles
5 and it no longer has the right to GM brands.

6 Obligations under the franchise agreements include
7 repurchase obligations for GM vehicles, parts and tools,
8 warranty obligations, insurance obligations, fuel fill
9 obligations, direct dealer incentive obligations, wholesale
10 floor plan support, local advertising assistance and funding
11 for dealer websites and other IT services. All of which are
12 meaningless, burdensome or both for a company that no longer
13 makes and sells vehicles.

14 It is a fair inference to draw that Old GM and New GM
15 conferred when New GM decided which franchise agreements it
16 wishes to assume. And obviously the thirty-five dealers'
17 franchise agreements at issue here weren't among them. But
18 ultimately the decision as to whether to take a franchise
19 agreement was New GM's. And when these agreements weren't
20 assumed by New GM, Old GM, Motors Liquidation Company, at the
21 risk of stating the obvious, didn't need those franchise
22 agreements itself.

23 Here what we now have is a Motors Liquidation Company
24 that no longer is in the car and truck business, dealerships
25 are pointless and dealer franchise agreements are an

1 unnecessary and expensive burden. I don't need an evidentiary
2 hearing to find any of those facts.

3 Now turning to my conclusions of law and bases for
4 the exercise of my discretion, the objectors make three basic
5 arguments. They assert that there was a failure to invoke
6 appropriate business judgment, that the decisions resulted in
7 hardship to them that I must consider and that they are
8 entitled to rights that they have under state law under
9 statutes and case law for the protection of dealers. I'll deal
10 with those contentions in turn.

11 Turning first to business judgment. I find, as
12 conclusions of law or mixed questions of fact and law, the
13 courts generally will not second guess a debtor's business
14 judgment concerning the rejection of an executory contract.
15 See, for example, In re Riodizio 204 B.R. 417, 424 (Bankr.
16 S.D.N.Y. 1997); In re Farmore 204 B.R. 948, 951-952 (Bankr.
17 N.D. Ohio 1997). The purpose behind allowing debtors to reject
18 executory contracts is to allow them to abandon burdensome
19 property, see In re Orion Pictures 4 F3d 1095, 1098 and In re
20 Old Car Co, that's the former Chrysler case, 406 B.R. 180
21 (Bankr. S.D.N.Y. 2009).

22 Accordingly, the scope of the bankruptcy court's
23 inquiry is limited. Under the business judgment standard, the
24 Court must determine whether rejection will benefit the
25 debtors' estates. As part of this determination the Court must

1 determine whether the debtors made their decisions rationally,
2 see In re Pilgrim's Pride 403 B.R. 427. Irrational bases of
3 decision making include racial and gender discrimination and
4 retaliatory animus, see Pilgrim's Pride at p. 428. Such bases
5 are antithetical to sound business judgment and demonstrate bad
6 faith, whim or caprice. And I've been quoting from Old Car Co.

7 However, whether the debtor is making the best or
8 even a good business decision is not a material issue of fact
9 under the business judgment test, see Old Car Co. and Wheeling
10 Pittsburg 72 B.R. 849.

11 Here, Motors Liquidation's business purpose is easy
12 to understand. Frankly, it's obvious as counsel for the
13 creditors' committee supporting the debtors' motion in a recent
14 matter also before me, made clear Motors Liquidation no longer
15 makes cars and trucks, it doesn't need dealers. Motors
16 Liquidation is unable to meet many of the obligations under the
17 franchise agreements and it would be inordinately expensive
18 and/or pointless for Motors Liquidation to meet obligations for
19 the remainder.

20 When Judge Gonzalez was deciding Car Co -- Old Car
21 Co. and he found that the debtors exercised sound business
22 judgment he noted the obvious in that case, one that's no less
23 obvious here. The debtors would no longer be in the car
24 manufacturing business, see 403 B.R. 196, therefore they reject
25 the agreements that are an integral part of conducting that

1 business and without which car business they cannot perform nor
2 have any reason for performing under dealer franchise
3 agreements. In fact, because the dealers here were GM's risk
4 performers, GM would be well within its business judgment if it
5 had determined to reject these franchises even if GM were
6 continuing as a standalone company.

7 In the course of oral argument I noted how so few of
8 the objectors had addressed Judge Gonzalez' decision in Old Car
9 Co., remember that's the former Chrysler case which was renamed
10 after Chrysler, like Old GM, came to be no more than a
11 liquidating shell. Old Car Co. is, of course, on all fours
12 with this case save only for the fact that dealers here were
13 offered better options by GM than dealers were offered in
14 Chrysler.

15 Judge Gonzalez expressly dealt with several of the
16 issues that we have here and it's unnecessary for me to discuss
17 those issues in comparable length. It's just extraordinary how
18 similar this case is to Old Car Co., fully as much so as it was
19 when I dealt with the earlier issues on the 363 sales.

20 First, as to business judgment, I find here as a
21 mixed question of fact and law that the decision making process
22 was rational and an exercise of sound business judgment. As in
23 Old Car Co., I should not and do not disturb the business
24 judgment decision. I also can and do find, as Judge Gonzalez
25 found in Old Car Co. that rejection benefits the debtors'

1 estates so that even if we were applying that higher standard,
2 as we do by way of example when we're ruling on settlement
3 motions under Rule 9019, that I could find that to be satisfied
4 as well. Here no evidence is presented to me showing that the
5 debtors made their individual rejection decisions irrationally
6 such that the rejections demonstrate bad faith or whim or
7 caprice.

8 Turning now to the matter of hardship. Several of
9 the objectors have pointed out the hardship this series of
10 rejection motions causes them and I take that as true. I fully
11 understand the hardship to the objectors and have great
12 sympathy for them. But as with the Stillwater Mining matter
13 earlier in this case, this is another one of the many decisions
14 that I've been forced to make and may well have to make in the
15 future where I have to deal with the unfortunate consequences
16 of corporate financial distress. So that others do not suffer
17 even more the Bankruptcy Code provides means for debtors to
18 shed burdensome obligations of which these franchise agreements
19 are classic examples.

20 For purposes of this motion, I must consider the
21 debtors' business judgment and even if I were to apply the more
22 rigorous test of what's in the best interest of the estate, as
23 I noted just a moment ago, this motion would pass muster under
24 that standard as well. Likewise, there's no basis in the law
25 nor has any been cited to me for considering hardship to the

1 counterparty on a motion of this character where, for example,
2 Congress hasn't directed us to consider competing
3 considerations as we're required to do for collective
4 bargaining agreements.

5 As noted by Judge Lynn in Pilgrim's Pride, 403 B.R.
6 425, while the impact of rejection on a counterparties'
7 community may be significant, that is not an uncommon result of
8 the cutbacks that typically accompany a restructuring in
9 Chapter 11. So there not only did Judge Lynn reject hardship
10 to the party but he even rejected hardship to the surrounding
11 community.

12 Now turning to the argument that the objectors have
13 rights under state law such as by state dealer protection
14 statutes. These arguments, too, were addressed and rejected in
15 Old Car Co. Once more, I won't repeat that discussion or
16 analysis at length. It's sufficient for the purposes of this
17 decision to note Judge Gonzalez' overview of this aspect of his
18 decision. Consistent with the order, the Court concludes that
19 the dealer statutes are pre-empted by Section 365 with respect
20 to rejection of the rejected agreements. Of course, as with
21 contract rejections in general, damages are still calculated
22 according to state law, see 403 B.R. 199-207.

23 For all of these reasons, I must overrule all of the
24 objections that were filed on a general basis by the various
25 objectors whose objections were not otherwise resolved.

1 Now let me finally turn to the special objections of
2 the two objectors who spoke today. Neither offered to find
3 that the general principals I described above would be
4 different in any way for them. And until and unless they can
5 show me that their facts are different, essentially by reason
6 of bad faith decisions aimed at them by GM they will have to be
7 considered the same way. But they rely on statements on TWA
8 and Old Car Co. that to invoke the business judgment rule on a
9 rejection motion the debtor cannot act in bad faith or based on
10 whim or caprice. That's essentially what we're down to now.

11 Neither of the two objectors made any showing of bad
12 faith, whim or caprice on the record developed to date. But in
13 each case they said they wanted to see the basis for the DPS
14 scores that Motors Liquidation computed and they wanted to see
15 why they weren't chosen for continuation; contending, in
16 substance, that they were having difficulty responding to the
17 motion when they didn't know the basis upon which Motors
18 Liquidation acted the way it did.

19 While I Have no reason to conclude that providing
20 them that information would change the result, I'm a little bit
21 uncomfortable with the fairness of confronting them with
22 evidence that they could not previously see. And I think the
23 debtors must provide that to them. I think that the two
24 remaining objectors should then have the right to submit
25 anything that flows from that evidence, once they've had a

1 chance to see it, to see if the bad faith, whim or caprice that
2 the law requires can be found.

3 Finally, Everett Chevrolet contends that it was the
4 victim of bad faith and/or racial animus. So far, as I noted,
5 there has been no evidence of that. But with the factual
6 findings of Judge Lucas I think Everett Chevrolet should be
7 entitled to some discovery, if it wants it, to investigate
8 whether GM acted in collusion with GMAC in connection with the
9 bad GMAC acts that Judge Lucas found. And I note in that
10 connection that even if the facts that Judge Lucas found turned
11 out not to be legally significant in that Washington action,
12 the facts he found might still be the facts or they might be
13 vacated, I don't know. But the point is that the facts that
14 are important are not the facts with respect to GMAC it's the
15 facts with respect to GM.

16 And I emphasize that this requires more than a
17 showing that GM acted on financial results that were caused by
18 acts of GMAC. It would require giving me evidence by which I
19 should find that Old GM and not just GMAC acted in bad faith.

20 Likewise, I'll allow Everett Chevrolet reasonable
21 discovery, if it wants it, to inquire as to the possibility
22 that Everett Chevrolet's termination was the result of racial
23 animus. Irrational bases of decision making include racial and
24 gender discrimination and retaliatory animus. Judge Gonzalez
25 noted that in Old Car Co. quoting the earlier case law. Such

1 bases are antithetical to sound business judgment and
2 demonstrate the bad faith or whim or caprice that is the basis,
3 essentially the only basis for beating back the business
4 judgment rule. Judge Gonzalez noted that at 406 B.R. 193
5 quoting Pilgrim's Pride 403 B.R. 428.

6 While I'm fully cognizant of the points Mr. Henderson
7 made about there being more proportionately minority dealers
8 now than there were before and implicitly that there was a
9 strong direction coming from the top, that these decisions
10 should be made in a non-discriminatory way, I think that
11 Everett Chevrolet should be allowed to inquire even if or
12 especially if anyone acted contrary to Mr. Henderson's
13 directions. I've discussed the mechanisms for that above.
14 We're not going to have an evidentiary hearing until people
15 make submissions to me that lead me to believe that there's
16 enough there to make that necessary or appropriate.

17 After getting the information or in Everett
18 Chevrolet's case the discovery, you're to provide me with
19 further submissions, if you wish, to show me why the two
20 objectors' circumstances are different from those as to whom
21 I've already ruled. I'll then determine whether an evidentiary
22 hearing is necessary or appropriate.

23 Finally, I will encourage, though not require, Motors
24 Liquidation and New GM to see if they can still offer the
25 objectors here the wind down agreements that the objectors once

1 turned down. The objectors may have turned those agreements
2 down without fully understanding how strongly the law requires
3 bankruptcy judges in my position to honor business decisions of
4 the type we have here, especially where we have a situation
5 where Motors Liquidation no longer makes cars. And they may
6 not have fully understood the law as articulated so well in
7 Pilgrim's Pride that individual hardships to counterparties to
8 contracts with debtors in bankruptcy, while of course a matter
9 of sorrow to any bankruptcy judge, are an inevitable
10 consequence of corporate financial distress. And those
11 hardships are the price we must pay to allow companies to
12 survive to save as many jobs as we can and to provide whatever
13 assistance we can to the creditor community as a whole.

14 The debtors are to settle an order in accordance with
15 the foregoing. You're to work out with the debtor -- excuse
16 me, with the two objectors' delivery to them of the information
17 concerning their scores and their decision files, after which
18 they'll be allowed to make supplemental submissions if they
19 wish. You're to work out the schedules for submission of that,
20 if they're reasonable I'll approve them. I'll want you to
21 paper your deal in a scheduling order or stipulation. If it's
22 reasonable I won't have a problem with it.

23 All right. Not by way of re-argument, I think that
24 deals with us on the dealers. Mr. Smolinsky?

25 MR. SMOLISNKSYS: Thank you, Your Honor. Joe

1 Smolinsky for the debtors. We, of course, will work with the
2 other side to make sure they have all the information they need
3 and engage in dialogue and work out scheduling.

4 The one thing I would like to clarify, it was
5 important to us to make the rejection effective as of the 10th
6 of July, that being the closing. And I think it would be
7 appropriate to have at least an understanding that the
8 contracts are deemed suspended and that the debtors are not
9 required to perform under those contracts as we go forward with
10 possible discovery in working out these issues.

11 THE COURT: And, presumably, if there is no change in
12 the decision with respect to these last two, that it be nunc
13 pro tunc to the same earlier date of July 10th?

14 MR. SMOLISNKSYS: Yes, Your Honor.

15 THE COURT: I think I understand why you're asking
16 for that. Is there any objection by the counsel for the
17 objectors?

18 MR. DAVIS: Jeffrey Davis for the Forrest
19 dealerships. Judge, it's our understanding from reading the
20 motion of Motors Liquidation that the exclusive use agreements
21 were not identified as ancillary agreements. They listed those
22 types of agreements as ancillary though counsel in his reply
23 stated a group got together and they determined that the
24 exclusive use agreements were ancillary but we don't see that
25 it's listed in their motion in those types of agreements. And

1 so I don't -- I think the Court has to determine whether
2 exclusive use is ancillary and is part of the motion before the
3 Court or not.

4 THE COURT: Well I think the debtor conceded that
5 they are and that if its motion is granted you're to be off the
6 hook on those ancillary agreements. Did I understand you
7 incorrectly, Mr. Smolinsky?

8 MR. SMOLISNKSYS: That's correct, Your Honor.

9 THE COURT: Does that skin the cat for you or do you
10 have a separate concern?

11 MR. DAVIS: That was it, Your Honor.

12 THE COURT: Okay.

13 MR. DAVIS: Your Honor, with respect to deeming the
14 franchise agreements suspended, I would propose an alternative
15 and that alternative being that Everett Chevrolet be treated
16 similarly to those individuals who signed -- those entities who
17 signed wind down agreements until a determination is made as to
18 whether Everett Chevrolet should have a participation
19 agreement.

20 THE COURT: Well, the problem that I have is you're
21 expecting the debtors to keep performing when I cut you some
22 slack and I didn't just treat you like everybody else, even
23 after you had given me no evidence of racial animus and no
24 evidence that you had been treated in bad faith by GM as
25 contrasted to GMAC?

1 MR. DAVIS: Your Honor, I'm just trying to make this
2 transition as smooth as possible for Everett Chevrolet.

3 THE COURT: Well, yes, but this is a court of law.
4 Mr. Smolinsky, do you want to respond?

5 MR. SMOLISNKSYS: Your Honor, Joe Smolinsky. I think
6 this Court is aware of the wind down budget that we're
7 currently operating under. The only basis upon which the
8 debtors were able to enter into wind down agreements is based
9 on the presupposition that those agreements would be assumed
10 and assigned to New GM.

11 The wind down agreements provide for a host of
12 financial accommodations which the debtors are not in the
13 position to provide. So in terms of seeking to perform under
14 it, I think that that would be an issue for New GM.

15 We're prepared to engage in a dialogue to see whether
16 New GM would offer the wind down agreement, as Your Honor had
17 suggested. But in terms of the interim period, we can't compel
18 New GM to perform and to take an assignment of a temporary wind
19 down agreement nor are the debtors in a position to provide
20 those financial accommodations.

21 THE COURT: I am not going to order any particular
22 compliance for Everett Chevrolet in this interim period.
23 Frankly, with no evidence having been put forward to show
24 either that there was racial animus or that GM, as contrasted
25 to GMAC, acted improperly I feel like no good deed goes

1 unpunished and that if I erred in that decision it was by not
2 shutting you down right now and allowing you to move for 60(b)
3 relief if it ever turned out that GM, as contrasted to GMAC, it
4 acted improperly.

5 I don't know what the evidence will show. If it
6 shows that GM acted knowingly in bad faith then, you know, that
7 at least seemingly is going to give your client some rights.
8 But I am -- when you haven't shown any basis for relief so far,
9 I'm not going to order it. You are; of course, free to make
10 whatever deals you want with either Old GM, now called Motors
11 Liquidation Company, or New GM. And if GM is -- if New GM is
12 receptive to the suggestion I made, to make alternative
13 arrangements you want to make with them. But I'm not ordering
14 anything.

15 MR. DAVIS: Understood, Your Honor. And I do thank
16 you for your generosity.

17 THE COURT: All right. Anything else? Now we have,
18 of course, the matter under the other executory contracts. Mr.
19 Smolinsky, at one time there was other business as well,
20 dealing with your interim fees and the desire of New York State
21 and the Tribe to review them. Are those issues still before me
22 or what?

23 MR. SMOLISNKSYS: Your Honor, we have a number of
24 uncontested matters that we can rush through very quickly. The
25 one item, as you noted, that still was open was the interim

1 compensation motion. I think you saw in our reply that we had
2 certain concerns about individual creditors having the right to
3 effectively stop funding professional fees, perhaps in an
4 attempt to gain leverage for their individual circumstances.
5 But we have been in discussions with both objectors and during
6 the break we were able to finalize language.

7 The sum and substance of the agreement would be that
8 we would provide the state and the -- is the Regis Mohawk
9 Tribe -- with copies of our monthly fee statements although
10 they would agree that they can't object until such time as the
11 interim regular quarterly fee applications come before the
12 Court. And I have two paragraphs that I can read into the
13 record with respect to that so that they would have current
14 time information about the fees that are being incurred during
15 the case.

16 I do note that the committee, in speaking to them,
17 have raised certain issues relative to the confidential aspects
18 of what might be in those fee statements, those monthly fee
19 statements.

20 THE COURT: Confidential stuff on the part of efforts
21 by the debtors or vis-a-vis the creditors' committee's fee
22 statements which would seemingly be subject to the same
23 problem?

24 MR. SMOLISNKSYS: I think their concern is more broad
25 based. Environmental claims are a major aspect of what we have

1 left in this case.

2 THE COURT: Sure.

3 MR. SMOLISNKSYS: And the concern, and rightfully so,
4 is that there is going to be a lot of strategy being thought
5 about and potential litigation strategies. And those may very
6 well find their way into the monthly fee statements. We would
7 likely have to redact. The question is whether we redact
8 separately for the two objectors or for everybody. But these
9 are the issues that we're talking about. Conceptually, we
10 don't have a problem providing them with the monthly fee
11 statements if that resolves the objection.

12 THE COURT: I think I already understand the point
13 but Ms. Caton has risen. Why don't you come on over if you
14 want to expand on that, Ms. Caton?

15 MS. CATON: Thank you, Your Honor. Amy Caton from
16 Kramer Levin on behalf of the creditors' committee. Your
17 Honor, I think our point goes a little bit farther than Mr.
18 Smolinsky stated before. We just heard about this potential
19 resolution at the end of the recess and unfortunately we didn't
20 have time to discuss it very far with Mr. Smolinsky or the
21 State of New York and the St. Regis Mohawk tribe.

22 The quarterly fee application process for our firm,
23 and I imagine all of the firms, is a pretty lengthy process.
24 We go through our monthly bills. We summarize them. We look
25 further to see whether there needs to be additional time

1 written down and, you know, if there were unnecessary expenses.
2 And we do this on a quarterly basis, I think, for a reason and
3 that is it's a time consuming process and one that we don't
4 want to bill the estate for on a monthly basis.

5 I understand if this is only two creditors looking
6 but it's a variety of professional's monthly statements and
7 this could be time consuming for people to think about third
8 parties reviewing their monthly fee statements each month.

9 In addition, as Mr. Smolinsky stated, environmental
10 liabilities are one of the biggest issues in this case and we
11 want the opportunity to review the debtors' professionals,
12 their monthly fee statements as well and talk to them and
13 determine whether or not there need to be redactions made in
14 these cases with respect to publicly filed fee applications so
15 that the parties can, I guess, not let their adversaries on to
16 their strategy on a going forward basis.

17 We're not looking at an administratively insolvent
18 estate here. The committee is highly concerned about
19 professional fees in this case, not because of administrative
20 insolvency but because we have unsecured creditors that are
21 looking at receiving substantial values here from the New GM
22 stock and warrants. And we'll be carefully reviewing the fee
23 applications or the monthly fee statements as will the U.S.
24 trustee.

25 What I would propose as a solution here is rather

1 than submitting detailed monthly fee statements to the State of
2 New York and to the St. Regis Mohawk Tribe is to provide them
3 with a chart or something of that nature showing that the fees
4 and expenses for each of the professionals on a monthly basis
5 so that they can feel like they're keeping tabs but without
6 getting the detailed disclosure that they'll be welcome to get
7 on a quarterly basis. And that's what we would like to propose
8 as a solution here.

9 THE COURT: All right. I don't think --

10 MS. LEARY: Your Honor --

11 THE COURT: Yes, is somebody on the phone?

12 MS. LEARY (TELEPHONICALLY): Yes, Your Honor. This
13 is Maureen Leary for the Attorney General's office and the New
14 York State Department of Environmental Conservation. Thank you
15 very much for allowing me to appear by telephone. And I
16 believe Jacob Lamme for the tribe is also on the phone.

17 MR. LAMME (TELEPHONICALLY): I am, Your Honor.

18 MS. LEARY: If I could just, very quickly, run down
19 the interest thing and -- so everybody's on the same page with
20 why we are involved in a pretty straightforward motion.

21 Certainly the Court's aware of the wind down facility
22 that is (indiscernible) billion dollars. That pot of money is
23 going to be shared by a number of interests, obviously the
24 professionals. Certainly, as counsel has pointed out, the
25 environmental (indiscernible) obligations which, as my limited

1 objection sets forth, are quite significant in terms of dollar
2 amounts.

3 A couple things, I'm not exactly clear why the
4 creditor committee is interested in redacting what otherwise
5 would be another party's fee application. I'm not clear about
6 that other than their own --

7 THE COURT: You don't? I certainly do. If the
8 creditors' committee is picking up the financial pieces of the
9 debtor's efforts, vis-a-vis its environmental obligations, I
10 would think that the creditors' committee would care about it
11 as much or more so than the State of New York would.

12 MS. LEARY: Okay. Fair enough. But unlike the
13 creditors' committee or even the United States trustee or the
14 debtor's counsel, particularly with respect to the
15 environmental consultant's fee, there's no one indicates, other
16 than my client who has experience working with consultants and
17 reviewing their fees, and -- because it comes out of state
18 funds. So it's something that I view as actually a cooperative
19 agreement and which certainly could result in (indiscernible)
20 all around. So the expertise that would benefit the
21 (indiscernible) should free up those professionals. I think
22 it's important for the Court to understand there are three
23 pending applications before this Court for retention nunc pro
24 tunc to June 3rd --

25 THE COURT: Wait. You're breaking up very badly, Ms.

1 Leary.

2 MS. LEARY: I apologize, Your Honor.

3 THE COURT: Are you on a speaker phone or something
4 of that sort?

5 MS. LEARY: I am not but I am on a BlackBerry because
6 I'm not in my office.

7 THE COURT: That may be causing the problem but I'm
8 losing words. Go on, please. I think I get most of what
9 you're saying.

10 MS. LEARY: Well, yeah, (indiscernible) the
11 environmental consultant's fees (indiscernible) peer review.
12 And I think we would provide both the estate and the creditors'
13 committee with value added in our review of that.

14 But our position, which is -- there's a
15 (indiscernible) but should have (indiscernible) that the United
16 States trustee and the creditors' committee and the debtor's
17 counsel would be very vigilant in reviewing the fee apps so
18 that (indiscernible) the environmental (indiscernible) that
19 provides. I believe that's set forth in a 363 decision. The
20 applicants are --

21 THE COURT: I lost that. I'm sorry. Obviously I'm
22 not going to order you to take calls, going forward, from your
23 office but you're going to have to either repeat what you said
24 or not appear before a court on a BlackBerry.

25 MS. LEARY: Yeah. I apologize Your Honor. And what

1 I will do is simply rely on our papers. Can you hear me now a
2 little bit better?

3 THE COURT: Yes. I heard you say you're going to
4 rely on your papers.

5 MS. LEARY: Yes, I will do that as well as make any
6 additional submissions necessary.

7 THE COURT: All right. Ladies and gentleman, given
8 Ms. Caton's concerns, I don't think that I could ratify a deal
9 that the debtor made with the tribe or with the New York State
10 even if the debtor had a full meeting of the minds on that.
11 Does the tribe have anything to add?

12 MR. LAMME: Your Honor, this is Jacob Lamme. You
13 know, while the case is not administratively insolvent at this
14 time the tribe just has to make sure that it stays this way and
15 that's why we have an interest in making sure all of the fees
16 that are paid to professionals are reasonable. And that's the
17 basis of our objection, Your Honor.

18 THE COURT: All right. Ladies and gentlemen, I think
19 that your efforts to try to reach a deal are not going to be a
20 good use of time and I'm simply going to rule. And the bottom
21 line is going to be that both the State of New York and the
22 tribe, along with any other creditors for that matter who want
23 to be heard, will have the full panoply of rights they choose
24 to exercise on interim fee apps but will not have special
25 rights via the review or approval on monthly fee requests and

1 the following are the bases for the exercise of my discretion
2 in this regard.

3 First, I believe that it is inappropriate for any
4 party, and I've said this in other cases in other contexts to
5 try to achieve its will by affecting an imposing party by the
6 purse strings. So it is a matter of concern to me, as it is to
7 most judges, for any private litigant who is not a fiduciary
8 for the estate to have the ability to deprive an opposing
9 attorney of compensation.

10 Apart from that, I would not, in a thousand years,
11 countenance the debtors or the creditors' committee, looking
12 over the shoulders of New York State or the tribe. Nor do I
13 think it's appropriate for the New York State or the tribe to
14 be looking over the shoulders of the debtors or the creditors'
15 committee.

16 The choice of professionals' time entries with
17 respect to particular experts, time spent on various things
18 leaves footprints which only the most idiotic of examiners of
19 documents couldn't draw important inferences from.

20 And the last thing I'm going to suggest is that the
21 environmental claimants, New York State and the tribe being the
22 most obvious examples, are anywhere near in that category.
23 They've been very able advocates before and I'm sure they're
24 going to be that. And frankly the issues that they're
25 addressing, especially the pollution in that plant that I

1 believe is in -- your plant is way up near the northern New
2 York/Canadian border if I'm not mistaken, am I correct? The
3 Messina plant?

4 MR. LAMME: Your Honor, this is Jacob Lamme for the
5 tribe again. It's the GM Messina facility.

6 THE COURT: Yes. I'm well aware of the environmental
7 issues with respect to that. It's going to raise very serious
8 issues. I'm going to have to spend a lot of time on it unless
9 you can consensually resolve these matters. But I'm not going
10 to let either of you peer over the other guy's shoulders as
11 part of that.

12 Now inevitably some disclosure is going to be
13 required on quarterly fee apps but we'll jump off that bridge
14 when we come to it. At this time I am not going to be ordering
15 any disclosure of monthly fee reports, although I think I can
16 and should require, in some form, whether it be in a chart or a
17 letter or what disclosure on a monthly basis to New York State
18 and the tribe of what is being charged. Break it down by fees
19 and expenses. All right. What else do we have, Mr. Smolinsky?

20 MR. SMOLISNKSYS: Thank you, Your Honor. We have two
21 motions by the committee which I will let them speak. We have
22 a case management order which is consistent with orders that
23 you've entered before in other cases, such as BearingPoint,
24 which allows such money-saving procedures as serving by e-mail.
25 If Your Honor has any questions, we can address it.

1 THE COURT: Am I correct that they're wholly
2 unopposed?

3 MR. SMOLISNKSYS: Yes, Your Honor.

4 THE COURT: I don't see a need for argument; they're
5 approved.

6 MR. SMOLISNKSYS: Thank you, Your Honor. We also have
7 several applications to employ professionals. That would be
8 LFR, Brownfield, Claro, Jones Day and Baker & McKenzie and Lowe
9 Fell & Skogg. There have been no objections. We've worked out
10 our issues with the U.S. trustee. There was one supplemental
11 affidavit owned by Brownfield, I understand that that affidavit
12 has now been signed and is being submitted to the Court today.
13 So Mr. Velez-Rivera was here earlier. He had no problem with
14 entry of those orders.

15 THE COURT: All right. They're approved.

16 MR. SMOLISNKSYS: And I think, Your Honor, that leaves
17 the two committee motions.

18 THE COURT: Okay. I'll hear presentation on them but
19 so far as I'm aware they're unopposed as well.

20 MS. SHARRET: Your Honor. Jennifer Sharret from
21 Kramer Levin on behalf of the creditors' committee. The first
22 is the committee's application to retain Epiq Bankruptcy
23 Solutions as the committee's information agent and there are no
24 objections and we would respectfully request that it be
25 approved.

1 THE COURT: Granted.

2 MS. SHARRET: The second is the committee's motion to
3 clarify procedures under Section 1102 and 1103 of the
4 Bankruptcy Code, clarifying that the committee shall not
5 disclosure confidential information in setting up procedures
6 for creditors to request such information and procedures, such
7 as a website and telephone number, to solicit and receive
8 comments as required under the Bankruptcy Code.

9 THE COURT: Of course. That's granted also.

10 MS. SHARRET: Thank you, Your Honor.

11 THE COURT: All right. So now, I think, we're down
12 to the Karmann motions. I'm going to have to -- I will dictate
13 something but I'm not of a mind to make you or your colleagues
14 wait in the courtroom for that, Mr. Smolinsky, since dictating
15 a decision requires work that can sometimes be time consuming.
16 Is Mr. Kukla still on the phone?

17 MR. KUKLA (TELEPHONICALLY): Yes, I am, Your Honor.

18 THE COURT: All right. Well, I'm not inclined to
19 keep you on the phone for another couple of hours either. What
20 I think I'm of a mind to do is I'm going to get to work on it
21 now. And I would suggest, Mr. Kukla -- I assume you're already
22 back in your office. You're heading back to your office, Mr.
23 Smolinsky or can you get that way and be available to
24 participate in a conference call, an on-the-record conference
25 call?

1 MR. SMOLISNKSYS: Yes, Your Honor.

2 THE COURT: All right.

3 MR. KUKLA: Your Honor, do you have any idea when --
4 the reason is I have a prior engagement at 5 p.m.

5 THE COURT: Are you in the east?

6 MR. KUKLA: Yes.

7 THE COURT: You're in a suburb of Detroit?

8 MR. KUKLA: Yes, I am.

9 THE COURT: Yeah.

10 MR. KUKLA: I can have another attorney available.

11 THE COURT: Well, all right. That's option number
12 one. Option number two would be that I simply have the call
13 at, say, 9:00 tomorrow morning.

14 MR. KUKLA: That would be easier for me, Your Honor,
15 but whatever this Court would prefer.

16 THE COURT: Mr. Smolinsky, I see you nodding yes to
17 the latter alternative?

18 MR. SMOLISNKSYS: That's fine, Your Honor.

19 THE COURT: All right. Then I don't know how we deal
20 with this mechanically but let's figure that I'll try to
21 dictate something at 9 tomorrow.

22 MR. KUKLA: And, Your Honor, just -- and I apologize
23 for earlier but I just want to make one point of clarification.

24 THE COURT: Yeah, go ahead.

25 MR. KUKLA: And I won't go back there and try to

1 rehash argument but I just want to make one clarification which
2 was, with respect to the tooling issue, to the extent that Your
3 Honor determines that is a pseudo-contract, and I have to
4 clarify this with the client, but we may, in fact, believe if
5 it is assumable as an executory contract that there may, in
6 fact, be a pre-petition cure amount owed.

7 THE COURT: Uh-huh.

8 MR. KUKLA: I just wanted to make sure there was no
9 surprises and I feel that -- and as much as I mentioned
10 earlier, I apologize.

11 THE COURT: All right. Okay. Then we're adjourned
12 for today. Thank you.

13 MR. KUKLA: Thank you, Your Honor.

14 MR. SMOLISNKSYS: Thank you, Your Honor.

15 (Whereupon these proceedings were concluded at 2:52 p.m.)
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I N D E X

R U L I N G S

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Debtors' motion for entry of an order authorizing rejection of certain personal property agreements and/or abandonment of collateral to secured creditors approved subject to changes in proposed order stated on the record	18	14
Debtors' motion authorizing rejection of executory contracts and unexpired leases with certain domestic dealers granted with respect to nonobjectors (27 dealers); granted with respect to 33 of 35 dealers	54	14
Applications to employ LFR, Brownfield, Claro, Jones Day and Baker & McKenzie and Lowe Fell & Skogg approved	88	10
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C E R T I F I C A T I O N

I, Lisa Bar-Leib, certify that the foregoing transcript is a
true and accurate record of the proceedings.

LISA BAR-LEIB

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